Supreme Court, U.S.
FILED
DEC 16 1999
CLERK

No. 99-6615

In The

Supreme Court of the United States

MICHAEL WAYNE WILLIAMS,

Petitioner,

vs.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON, WAVERLY VIRGINIA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT APPENDIX
VOLUME III, PAGES 429 TO 672

BARBARA L. HARTUNG*
1001 E. Main Street
Suite 504
Richmond, Virginia 23219
Telephone: (804) 649-1088

JAMES E. MOORE
CHRISTIAN & BARTON, L.L.P.
909 E. Main Street
Suite 1200
Richmond, Virginia 23219
Telephone: (804) 697-4100

Counsel for Petitioner

**Counsel of Record*

MARK L. EARLEY
Attorney General
DONALD R. CURRY*
Senior Assistant
Attorney General

Office of the Attorney
General of Virginia
900 E. Main Street
Richmond, Virginia 23219
Telephone: (804) 786-4856

Counsel for Respondent

Petition For Certiorari Filed October 18, 1999
Certiorari Granted October 28, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

250PP

WILLIAMS V. TAYLOR: JOINT APPENDIX
TABLE OF CONTENTS

Page

VOLUME I

Relevant Docket Entries 1
Capital Indictments (Filed 6/29/93) 19
Discovery Motion: Excerpts (6/23/93) 24
Discovery Order (9/15/93) 30

Excerpts of January, 1994 trial transcript:
Stinnett Voir Dire 32
Opening Statements 54
Testimony Of:
Claude Meinhard 66
Jeffrey Cruse 73
Commonwealth's Ex. 13 162
Deborah Kay, M.D. 164
Lisa Schiermeier 187
George Li 200
Commonwealth's Ex. 42 210
Commonwealth's Ex. 43 214

VOLUME II

Richard Holt 215
Michael Williams 222
Court's Charge – Guilt Phase and Summations 249
Jury Instructions (Nos. 14-20) 290
Guilt Verdict: Capital Counts 295

TABLE OF CONTENTS – Continued

Page

Sentencing Phase:

Prior Adjudicated Offenses 300

Testimony of:
John Williams 302

William Massello 317

Sentencing Verdict: Capital Counts..... 333

Williams' Sentencing Statement (2/22/94) 336

Williams' Letter to Court 338

STATE HABEAS:

Letter: White to Meinhard (10/30/95)..... 340

Letter: White to Southall (10/30/95) 342

Letter: White to Von Schuch, Curry (10/30/95)..... 344

Letter: Curry to White (11/1/95) 352

Motion for Expert Services (11/30/95) 355

Letter: White to Curry (12/1/95) 361

Letter: Curry to White (12/11/95) 363

Opposition to Motion for Expert Services 364

Motion For Production of Cruse and Discovery 371

Opposition to Motion for Discovery 373

State Habeas Petition: Excerpts 376

Exhibits to State Habeas Petition:..... 393

Affidavit of Blessing (1/23/96) 394

TABLE OF CONTENTS – Continued

Page

Affidavit of Ford (1/26/96)..... 395

Affidavit of Carrico (1/25/96) 398

Cruse Plea Transcript (3/14/94)..... 401

Cruse Sentence Transcript (4/26/94) 415

VOLUME III

Exhibits to Respondent's Motion to Dismiss:

Affidavit of Ford and Carrico (2/15/96) 429

Affidavit of Woodson (2/14/96) 440

Affidavit of Blessing (2/7/96) 441

Affidavit of Juror Blanton (9/15/94) 443

Virginia Supreme Court Order Dismissing Writ (3/18/96) 444

FEDERAL DISTRICT COURT

Brief in Support of Motion For Experts:
Excerpts (9/3/96) 446

Letter: Curry to Moore (9/25/96)..... 456

Federal Habeas Petition (11/21/96): Excerpts..... 458

Index to Exhibits..... 483

Court Records Re: Stinnett..... 483

Affidavit of Pye (11/18/96)..... 492

Cruse Psychiatric Report (9/14/93) 495

Letter: Ennis to Blessing (3/25/97)..... 500

TABLE OF CONTENTS – Continued

Page

Affidavit of Blessing (3/11/97) 501

Motion For Leave to Invoke Discovery (4/29/97)..... 505

Reply to Opposition to Discovery (5/14/97) 514

Order Denying Discovery (7/16/97) 520

Letter: Brown to Cruse (7/29/97)..... 521

Second Motion for Leave to Invoke Discovery (7/31/97) 524

District Court Order and Opinion (4/13/98) 529

Motion for Leave to Invoke Discovery (4/17/98) 614

Petitioner's Rule 59(e) Motion (4/27/98): Excerpts 619

Exhibit: White Affidavit 625

Respondent's Exhibits:

Affidavit of Stinnett (4/27/98)..... 627

Affidavit of Woodson (4/27/98) 629

Letter: Moore to Curry (5/5/98)..... 631

Letter: Curry to Moore (5/5/98)..... 632

District Court Order Denying Rule 59(e) and Discovery Motion (5/15/98) 633

In Re: Fred W. Greene, No. 98-17 (4th Cir. 5/27/98) ... 635

District court order and opinion (6/3/98)..... 638

District court order (11/12/98) 647

District court order (12/15/98) 649

TABLE OF CONTENTS – Continued

Page

COURT OF APPEALS

Williams v. Taylor, No. 99-1 (4th Cir. Aug. 2, 1999) 651

Supreme Court Order Granting Certiorari and Motion To Proceed In Forma Pauperis 672

IN THE SUPREME COURT OF VIRGINIA

[Caption Omitted In Printing]

AFFIDAVIT

1. We are R. Donald Ford and Lucretia A. Carrico. We represented Michael Wayne Williams at his 1994 jury trial in the Circuit Court of Cumberland County for capital murder and numerous other related felonies. (Except where otherwise indicated, either expressly or by the context, further references to the terms "we," "us" and "our" should be construed to refer to the defense team as a whole and not necessarily to both defense attorneys individually).

2. One of us (Ford) has been practicing law for 16 years and the other (Carrico) for 18 years. At the time we were appointed to represent Williams, we both had extensive experience trying felony jury cases. One of us (Ford) had handled five capital cases prior to Williams', including one case that has been litigated all the way through a capital jury sentencing proceeding. While one of us (Ford) was primarily responsible for the guilt stage of Williams' case and the other (Carrico) was primarily responsible for the penalty stage, we consulted with each other throughout the case and jointly made all major decisions about the way the case was presented and tried. We worked very closely and very well together during the investigation and trial of Williams' case.

3. We conservatively estimate that together we spent a total of approximately 500 hours preparing for and trying Williams' case.

Jury Selection

4. We thoroughly prepared ourselves for jury selection. We spent a great deal of time preparing our own proposed voir dire questions and reviewing those proposed by the prosecution. In preparing for voir dire, we sought and obtained assistance from the Virginia Capital Case Clearinghouse (VCCC) at Washington and Lee.

5. With respect to the actual voir dire that was conducted, all of the questions that we asked or chose not to ask, and the jurors to whom such questions were or were not posed, were determined as a matter of trial strategy based upon what we thought at the time was in Michael Williams' best interest. During the voir dire process, we paid close attention not only to what the jurors said, but how they looked and sounded when they gave their answers. This information played an important part, not only in the way we conducted voir dire, but also in the decisions we made about which jurors to challenge for cause and which jurors to strike peremptorily.

6. With respect to Juror Judith Bernard, we decided not to object to the prosecution's challenge for cause because we were of the opinion that, on balance, the juror's answers indicated she would be a pro-prosecution juror. We were particularly concerned about the fact that the juror said she already had made up her mind based upon what she had read about the case and that she wanted "to see justice done."

Jeffrey Cruse

7. We thoroughly prepared for the testimony of Williams' co-defendant, Jeffrey Cruse: the Commonwealth gave us complete discovery of the investigative file, including the summary of the investigation prepared for the prosecution by the State Police; we interviewed the primary State Police investigator; we had Cruse's complete criminal record; we reviewed all of Cruse's statements to the police, as well as his testimony at Williams' preliminary hearings in Cumberland County and Prince Edward County where we had the opportunity to observe and cross-examine Cruse. We even obtained from the VCCC a written analysis of all possible inconsistencies in Cruse's various statements.

8. We also knew that prior to Williams' trial Cruse has been interviewed by a newspaper reporter. We had the published account of that interview as an additional source of information regarding Cruse's expected testimony. Although we did not interview Cruse prior to Williams' trial, we did discuss Cruse's expected testimony with the two lawyers who were representing Cruse. Both of these attorneys were present in Cumberland Circuit Court when Cruse testified against Williams.

9. We were aware prior to trial that Cruse previously had had an agreement with the Cumberland Commonwealth's Attorney whereby he would have been spared a possible death sentence and we were aware that the Commonwealth subsequently had revoked the agreement because Cruse had not been completely truthful.

10. Our basic strategy regarding the cross-examination of Cruse was to point him as a person who repeatedly had lied to the police and who, although he said he no longer had a plea agreement, was testifying the way he thought the prosecution wanted him to testify about Williams' role in the offenses in order to save his own life. We elicited from Cruse that he was a willing participant in the robbery, the ransacking and burning of the Kellers' house and the rape of Mrs. Keller. We pointed out the fact that Cruse's testimony conveniently had the two firearms involved changing hands between him and Williams at the points necessary to make Williams appear more culpable. We also impeached Cruse with a prior inconsistent statement from the preliminary hearing where he had falsely denied having a prior conviction for an offense involving lying, cheating or stealing. We wanted to impeach Cruse additionally with a prior misdemeanor assault conviction, but the trial judge ruled we could not do so.

11. In sum, we were as prepared to confront and cross-examine Cruse as well as we possibly could have been. None of his testimony was a surprise and, except for not being able to use his assault and battery as impeachment, we accomplished substantially what we set out to do.

Prosecutors' Arguments

12. As a matter of general strategy, we believe it is better not to object to a prosecutor's remarks or arguments to the jury unless absolutely necessary. Such objections run the risk of emphasizing adverse matters before

the jury or giving the jury the impression the defense is trying to cover something up. In Michael Williams' case, we refrained from making such objections because, in our opinion, any such objections would have been overruled by the trial judge and the objections could have adversely affected our client in the jury's eyes.

Voluntary Intoxication

13. Prior to trial, we thoroughly interviewed Michael Williams with respect to the murders in Cumberland County, as well as the four homicides in Prince Edward County with which he also was charged. On all occasions, he gave us a consistent, coherent account of what he said had occurred. Although he told us that on both occasions he had been drinking alcohol and using drugs, he never said or suggested that he could not remember what had happened. To the contrary, he remembered both events in great detail. All of his accounts, moreover, demonstrated to us that at the time of the events he was capable of rational thinking and planning, as well as the ability to carry out those plans.

14. We spent numerous hours researching Virginia law on the issue of voluntary intoxication as a defense to premeditated murder. Based upon this research, as well as what Michael Williams told us had occurred with respect to the Cumberland County crimes, we concluded that there was no evidence that would have supported a defense that he was so intoxicated on alcohol and/or drugs that he was unable to premeditate.

15. Michael Williams' testimony at the guilt stage of trial was consistent with what he had told us prior to

trial. A review of his detailed testimony clearly demonstrates why voluntary intoxication was not a viable defense.

16. At the penalty stage, Michael Williams' long history of alcohol and drug abuse was presented to the jury as a mitigating circumstance through the testimony of our appointed expert, Dr. Dewey Cornell. It was our strategy not to assert Michael's intoxication at the time of the crimes as an excuse for his actions, but rather as part of a continuing symptom of his overall disorder. We could not assert, however, that Michael Williams was so intoxicated that he was incapable of premeditation regarding the Prince Edward homicides, or even that he was not fully aware of what he was doing. To the contrary, based upon what he had told both us and Dr. Cornell, he deliberately shot George Atkinson, Sr. to prevent him from calling the police, he deliberately shot George Atkinson, Jr. after taking a significant period of time to decide whether to kill him, and he deliberately set the Atkinson house on fire to destroy the evidence of what he had done.

Dr. Massello

17. We were thoroughly prepared for Dr. Massello's testimony at the penalty stage regarding the autopsies of the four Prince Edward County victims. We had reviewed all of the autopsy reports and Dr. Massello's testimony was consistent with those reports. We decided, as a matter of trial strategy, not to cross-examine Dr. Massello. Our strategy was to get Dr. Massello off the witness stand as quickly as possible. We did not want to ask him any

questions which might result either in his using the photographs of the victims to illustrate his response or in the prosecution's using the photographs again on redirect. The photographs were very damaging to the defense and we simply did not want to run the risk of making a bad situation worse.

Johnny Williams

18. We chose, as a matter of strategy, not to cross-examine Johnny Williams because his testimony regarding what the defendant had told him about the Prince Edward homicides was a more favorable version of the event than what the defendant has told us. Johnny was a reluctant prosecution witness and it was our impression that the prosecution had not succeeded on direct examination in eliciting from him all the information it had hoped to elicit. We had thoroughly interviewed Johnny prior to trial, and we did not want to risk inadvertently eliciting such adverse information on cross-examination or giving the prosecution another chance to do so on redirect.

Williams' Mother and Grandfather

19. We called Michael Williams' mother and grandfather as witnesses at the penalty stage because we concluded that their value as mitigation witnesses outweighed any damage that would be done on cross-examination regarding the fact that after the Keller murders they took Michael out of Virginia to Florida and

Georgia. We did not object when the prosecution questioned them on this point because such an objection certainly would have been overruled on the grounds that the Commonwealth was entitled to cross-examine the witnesses on the issue of bias.

Mental Evaluation

20. Prior to trial, we requested the assistance of a mental health expert and submitted to the trial judge the names of three such experts of our choosing. One of those experts we chose was Dr. Dewey Cornell, a clinical psychologist who had been highly recommended to us by a member of the Richmond criminal defense bar. The trial judge appointed Dr. Cornell to assist us.

21. We provided Dr. Cornell with all of the relevant information regarding the crimes and Michael Williams' life history, and we consulted with Dr. Cornell on numerous occasions prior to trial. Dr. Cornell reported to us that his findings supported the position that Michael was competent to stand trial and sane at the time of the offenses. More particularly, Dr. Cornell concluded that Michael was not suffering from "psychotic symptoms such a [sic] delusions, hallucinations, or formal thought disorder" at the time of the crimes, nor was he suffering "from a mental disease or defect which would substantially impair his awareness of his actions or his ability to distinguish right from wrong." Dr. Cornell also provided us with a list of mitigating circumstance he had identified. (Three Letters from Dr. Cornell dated 12-8-93 are attached to this affidavit).

22. Dr. Cornell never indicated to us that further testing or evaluation was necessary or advisable. We specifically discussed with Dr. Cornell whether Michael Williams had organic brain damage because we were aware, and Dr. Cornell was aware, that at the time of Michael's birth there had been complications which reportedly had resulted in Michael not breathing for a period of time. Dr. Cornell, however, informed us that he had performed his own tests, including several standard neuropsychological tests, and satisfied himself that no further testing was indicated.

23. Although one of us (Carrico) did not have any familiarity at the time with the field of neuropsychology, the other (Ford) did because he previously had attended a capital litigation seminar where the subject matter was discussed. We also were aware that Dr. Cornell was familiar with neuropsychology. If Dr. Cornell had informed us that further evaluation was necessary or advisable, we would have requested the trial judge to authorize such an evaluation.

24. We were very satisfied with the assistance provided to the defense by Dr. Cornell. We know of no substantial mitigating evidence that could have been presented but was not presented, regarding either the crimes or Michael Williams' character, history or condition. Dr. Cornell's conclusions regarding Michael's degree of cognitive impairment, history of Attention Deficit Hyperactivity Disorder, and history of prenatal complications were presented in testimony at the sentencing hearing.

The Defendant's Testimony

25. We discussed with the defendant numerous times before trial whether he should testify. We discussed it with him again at the jail the night before it was time for him to testify. And we discussed it with him again during a recess immediately before he testified, which was shortly after the trial judge ruled that we could not elicit through the defendant's brother statements the defendant had made to him about Cruse's involvement in the crimes.

26. We advised the defendant that, if he did not testify, Cruse's testimony regarding the defendant's primary role in the murders would go unrebutted and that it is likely he would be convicted as charged. On the other hand, we advised him that Mr. Von Schuch was a skilled cross-examiner and that, in our experience, defendants who testified rarely succeeded in convincing a jury.

27. If we had been successful in getting the trial judge to let us elicit through the defendant's brother the evidence we wanted to present, we would have advised the defendant not to testify. Given the trial court's adverse ruling, however, we advised the defendant of all the pro's and con's and told him that the decision ultimately was up to him. The defendant then decided for himself to testify. This was consistent with Michael's insistence throughout our preparation of that case that he wanted to tell the jury what had occurred.

28. At the penalty stage, the defendant did not testify because, in our opinion, he did not do well as a witness at the guilt stage. In particular, his demeanor on the witness stand appeared very cold. Moreover, we

knew from what he had told us about the Prince Edward murders that very damaging information could have been elicited on cross-examination regarding his premeditated decisions to shoot George Atkinson, Sr. and George Atkinson, Jr., as well as his decision to burn down the house to destroy the evidence. We also knew that the forensic evidence regarding the "contact" gunshot wound to the back of one of the other victim's head did not support Michael's contention that he had shot this person as he was charging at Michael.

/s/ R. Donald Ford
R. Donald Ford, Jr.

/s/ Lucretia A. Carrico
Lucretia A. Carrico

Subscribed and sworn before me by R. Donald Ford, Jr. this 15th day of February, 1996.

/s/ Peggy J. Franklin
Notary Public

[SEAL]

My commission expires: 8/31/96.

Subscribed and sworn before me by Lucretia A. Carrico this 15th day of February, 1996.

/s/ Illegible
Notary Public

My commission expires: 3/31/96.

AFFIDAVIT

1. I am Robert G. Woodson Jr. I was the Commonwealth's Attorney for Cumberland County from 1989 to 1995. I prosecuted both Michael Williams and Jeffrey Cruse for capital murder in 1994. I presently am a General District Court judge in the 10th Judicial Circuit.

2. During the investigation of the capital crimes for which I prosecuted Williams and Cruse, I initially entered into a written plea agreement with Cruse and his attorney whereby Cruse would have been spared a death sentence. One of the conditions of the agreement, however, was that Cruse tell the complete truth and, when it subsequently was learned that he had breached this condition with respect to the rape of Mrs. Keller, I revoked the plea agreement.

3. At the time Cruse testified against Williams in January of 1994, he had no plea agreement. Cruse testified truthfully that there was no plea agreement and that he remained charged with capital murder and subject to the death penalty.

4. I do not recall specifically whether Williams' trial counsel were provided with an actual copy of Cruse's initial plea agreement, but I am confident that they were. A copy of this prior agreement was introduced at trial, however, and I know that Williams' attorneys were aware prior to trial of the substance of the prior agreement, as well as the fact that it had been revoked because Cruse had not been entirely truthful.

5. One of the other conditions of Cruse's initial plea agreement was that he take a polygraph test. Before such

a test was administered, however, I leaned that Cruse had not been truthful about the rape of Mrs. Keller and I revoked the plea agreement. Cruse later admitted that both he and Williams had raped Mrs. Keller. Because the plea agreement was revoked and because Cruse admitted his involvement in the rape, a polygraph examination of Cruse was not conducted.

/s/ Robert G. Woodson, Jr.
Robert G. Woodson, Jr.

Subscribed and sworn to before me by Robert G. Woodson Jr. this 14th day of February, 1996.

/s/ Carolyn Z. Helgeson
Notary Public

My commission expires: 8/30/99.

AFFIDAVIT

1. I am Donald C. Blessing. I am a lawyer licensed to practice in the Commonwealth of Virginia. Together with Lee Harrison, I represented Jeffrey Cruse on his charges of capital murder and other related felonies in Cumberland County.

2. Prior to being represented by Mr. Harrison and me, Cruse had been represented by James Baber. Before Mr. Harrison and I entered the case, Cruse and Mr. Baber had entered into a written plea agreement with the Cumberland Commonwealth's Attorney, whereby Cruse would have been spared a death sentence. This written

plea agreement, however, was revoked by the Commonwealth's Attorney because Cruse had breached the agreement by not telling the complete truth about the offenses.

3. I was present in Cumberland Circuit Court when Cruse testified for the Commonwealth at the capital murder trial of Michael Williams. At the time of Williams' trial, Cruse had no plea agreement with the Commonwealth. Cruse testified truthfully at that trial that he had no plea agreement, that he remained charged with capital murder for the Cumberland offenses, and that he was subject to a possible death sentence.

4. I do not have a specific recollection of whether Williams' trial attorneys asked our permission to interview Cruse prior to Williams' trial. I can state with certainty, however, that if such a request had been made, we would not have permitted Williams' attorneys to interview Cruse.

/s/ Donald C. Blessing
Donald C. Blessing

Subscribed and sworn to before me by Donald C. Blessing this 7th day of February, 1996.

/s/ Sharon G. Palmore
Notary Public

My commission expires: October 31, 1998.

AFFIDAVIT

1. I am Joan Kuester Blanton. I am a resident of Cumberland County and I served as a juror in the capital murder trial of Michael Wayne Williams in January, 1994.

2. During the jury selection process, I was questioned about the fact that my husband is a State Trooper. I answered all of the questions truthfully and to the best of my ability.

3. At no time before, during or after the trial have I ever discussed with my husband any contacts he may or may not have had with Michael Wayne Williams in my husband's official capacity as a State Trooper. To this date, I have no knowledge of any such contacts. After I was selected as a juror, I never discussed the case of Michael Wayne Williams with my husband until the case was over.

4. The fact that my husband is a State Trooper played no part in the decisions I reached in the case. I had no knowledge of Williams' prior record until evidence of his record was introduced at trial.

/s/ Joan Kuester Blanton
Joan Kuester Blanton

Subscribed and sworn before me this 15th day of Sept., 1994.

/s/ Judy S. Illegible
Notary Public

My Commission expires: May 31, 1997

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 18th *day of* March, 1996.

Michael Wayne Williams, Petitioner,

against Record No. 951589

Warden of the Mecklenburg Correctional Center, Respondent.

Upon a Petition for a Writ of Habeas Corpus

Applying the rule in *Hawks* v. *Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), to petitioner's allegations I(A), I(B), I(C), I(D), I(E), I(F), I(G), I(H), I(J), I(K), III(C), III(H)(2), III(J), III(L), III(M) and III(U); the rule in *Slayton* v. *Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), to petitioner's allegations I(H) (to the extent petitioner relies on the prosecutor's closing arguments), I(I), I(J) (to the extent petitioner relies on gender and economic status), I(K) (to the extent petitioner relies on the length of time he will spend on death row), III(A)(1), III(A)(2), III(B), III(E), III(F), III(G), III(H)(1), III(I), III(K), III(N), III(O), III(P), III(Q), III(R), III(S), III(T), IV(A), IV(B), IV(D), IV(E), V(A); and finding no merit in petitioner's remaining allegations, the Court is of opinion that the writ of habeas corpus should not issue as prayed for. On further consideration whereof, petitioner's motion for expert services; motion for production of Jeffrey Allen Cruse and discovery relating to Jeffrey Allen Cruse are denied. It is therefore ordered that the said petition be dismissed and the

rule be discharged. Chief Justice Carrico took no part in the consideration of this case.

A Copy,
Teste:
David B. Beach, Clerk

By: /s/ Patricia A. Krueger
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

J. D. NETHERLAND, WARDEN
MECKLENBURG CORRECTION
CENTER,

Respondent.

Civil Action No.
3:96CV529

Ex Parte
File Under Seal
Death Penalty Case

BRIEF IN SUPPORT OF MOTION
FOR FUNDS FOR EXPERT ASSISTANCE

Michael Wayne Williams ("Williams") has filed a motion, pursuant to 21 U.S.C. §§ 848(q)(9) and (10), for entry of an order authorizing the employment of experts to assist in the preparation of his petition for habeas corpus. This brief is filed in support of Williams' motion.

I.

Introduction

Michael Wayne Williams was convicted by a jury of the capital murders of Morris and Mary Keller and was sentenced to death in January 1994. His conviction was affirmed on direct appeal by the Supreme Court of Virginia on November 4, 1994, and rehearing was denied on January 13, 1995. His state habeas corpus petition was dismissed on March 18, 1996 by the Supreme Court of Virginia. Williams is indigent and this Court has appointed the undersigned counsel to represent him in this

federal habeas corpus proceeding, pursuant to 21 U.S.C. § 848(q)(4)(B). The services of a neuropsychologist, a mitigation specialist, an investigator, and a pathologist are necessary to assist Williams and counsel in the preparation of an appropriate federal petition for habeas corpus as set forth below.

II.

Neuropsychologist

Substantial evidence indicates that Williams suffered permanent organic brain damage at birth. A neuropsychological examination is required to confirm the existence and nature of such brain damage. Depending upon the neuropsychologist's findings, the existence of brain damage could provide important evidence relative to guilt of the offense or evidence in mitigation relative to sentence.

During the sentencing phase of Williams' trial, his mother testified that during her pregnancy with Williams her doctors could not detect a heartbeat or movement in the fetus for approximately two weeks. At birth, Williams was born with the umbilical cord wrapped around his neck, and the doctors who delivered Williams expressed grave concern about the baby turning blue and suffering from insufficient oxygen. At the request of Williams' counsel in his state habeas corpus petition, a neuropsychologist reviewed the mother's testimony and Williams' family and social history. The neuropsychologist concluded that there is a reasonable probability that Williams suffers from permanent organic brain damage. He

stated that a neuropsychological examination and evaluation are necessary to determine whether brain damage exists.

Williams' only expert witness at the sentencing phase of his trial, Dewey G. Cornell, Ph.D., was not qualified or trained in neuropsychology. Thus, Cornell failed to recognize the need for a neuropsychological examination to detect possible brain damage. Cornell testified only that Williams suffered from "attention deficit disorder."

Williams' state habeas corpus petition asserted claims that Williams was denied effective assistance of counsel and effective assistance of mental health experts, based in part upon the failure of trial counsel and Dr. Cornell to recognize the need for a neuropsychological examination. The Supreme Court of Virginia summarily dismissed these claims.

Given the strong probability that Williams suffers from brain damage, Williams should be provided a neuropsychologist to perform the appropriate examination and evaluation prior to filing his first federal habeas petition.

III.

Investigator and Mitigation Expert

After Williams was convicted of the February 1993 capital murders of Morris and Mary Keller, the same jury sentenced Williams to death, based largely upon the Commonwealth's evidence connecting Williams to four unadjudicated murders which occurred in Prince Edward County in December, 1992. Thus trial counsel, in effect,

were required to defend Williams against the Commonwealth's evidence of six murders, in two entirely separate incidents.

Williams' trial counsel requested appointment of an investigator to assist them. The trial court denied their request. The record in this case reveals significant areas of undeveloped evidence, relevant to both guilt and sentence.

The Commonwealth's evidence at the penalty phase of Williams' trial, linking Williams to the unadjudicated Prince Edward murders, revealed the existence of potential defenses and mitigation evidence which trial counsel failed to pursue. For example, John Williams, the younger brother of the petitioner, testified that the petitioner told him that he shot the first Prince Edward victim (Villalobos) after Villalobos argued with petitioner and threatened the petitioner with a loaded gun. According to John Williams, the petitioner told him that a second Prince Edward victim attempted to assault the petitioner before he was shot. The medical examiner's report regarding this individual showed that the victim was found in a pugilistic position, confirming Williams' testimony. John Williams' testimony also established that prior to the Prince Edward shootings he, the petitioner, and the shooting victims had all become very intoxicated.

Notwithstanding these clear indications that the Prince Edward shootings may have involved potential defenses to the crime as well as significant mitigating factors, trial counsel, without the aid of an investigator, did not develop potentially critical evidence. As a result, no significant evidence of self-defense or intoxication was

introduced by defense counsel as to the Prince Edward murders. The facts of the Prince Edward homicides merit further investigation.

Williams' state habeas corpus petition asserted claims that he was denied effective assistance of counsel and a fair trial, based in part upon the trial court's refusal to appoint an investigator and on trial counsel's failure to effectively develop evidence about the Prince Edward shootings. The Supreme Court of Virginia summarily denied these claims.

The Commonwealth's evidence relating to the Keller murders also revealed the existence of potential defenses and mitigating evidence of Williams' voluntary intoxication. Trial counsel failed to investigate and pursue this avenue of defense.

The Commonwealth's chief prosecution witness, Jeffrey Alan Cruse, testified that for eight to ten hours before the Kellers were killed, he and Williams had been drinking alcohol and using mind-altering, illegal drugs. Nevertheless, defense counsel, without the assistance of an investigator, failed to fully develop evidence of the extent and effect of Williams' intoxication at the time the Kellers were shot. Such evidence could have presented a possible defense to the crime or a significant, statutory mitigating factor in connection with the Keller murders.[1]

Williams' state habeas corpus petition asserted claims that he was denied effective assistance of counsel and a

---

[1] The effects of alcohol and drugs, such as LSD and marijuana, on a brain damaged individual such as Williams merits further exploration.

fair trial, based in part upon the failure of counsel to develop and present voluntary intoxication evidence. The Supreme Court of Virginia summarily denied this claim. Both an investigator and a mitigation specialist are required to assist in the preparation of claims in this federal petition.

Factual investigation is required concerning the Commonwealth's chief prosecution witness, Jeffrey Alan Cruse. Cruse certainly must have had an agreement with the Commonwealth that it would not seek the death penalty in his case. Cruse testified against Williams, and while doing so Cruse admitted that he was a full participant in the Keller murders.

At Williams' trial, Cruse testified that he had originally reached an agreement with the Commonwealth that he would be charged with and tried for first degree murder, not capital murder. Cruse, however, testified that the deal was canceled because he lied about his part in raping Ms. Keller. The Commonwealth, therefore, elicited from Cruse testimony that left the jury believing that Cruse no longer had an agreement and that he was at risk of a death sentence while testifying against Williams.

Although Cruse was, in fact, indicted for capital murder at the time of Williams' trial, Cruse later pled guilty to capital murder, and with the enthusiastic recommendation of the Commonwealth, he received a sentence of life imprisonment when sentenced by the Court. These facts strongly suggest that Cruse had a deal at the time of Williams' trial.

There is nothing in the record or in trial counsel's files to show that Williams' trial counsel investigated the

existence of a formal plea agreement or any informal "understanding" between Cruse and the Commonwealth as to the sentencing recommendation the Commonwealth would make if Cruse testified against Williams. If Cruse had any agreement or assurance that the Commonwealth would recommend a life sentence in his case if he testified against Williams, such evidence would have been very important when challenging Cruse's testimony at the guilt phase of Williams' trial and would establish a mitigating factor relative to Williams' sentence.

Williams' state habeas corpus petition asserted claims that he was denied effective assistance of counsel and a fair trial, based in part upon the Commonwealth's representation that there was no agreement with Cruse and Williams' trial counsel's failure to effectively investigate the matter. The Supreme Court of Virginia summarily denied these claims.

Williams has effectively been denied the opportunity to investigate and develop important guilt phase and sentencing phase mitigation evidence relating to his involvement in the Keller murders and the Prince Edward killings. Williams has also been denied the opportunity to investigate any plea agreement between Cruse and the Commonwealth. Accordingly, Williams requests that this Court authorize counsel to retain the services of an experienced investigator to locate and interview witnesses and to develop other pertinent evidence.

Williams further requests that this Court authorize counsel to employ a mitigation specialist who can assist

counsel and the investigator in identifying and evaluating relevant mitigation evidence. The mitigation specialist will have to interview petitioner's family, friends, teachers, counselors, doctors, employers, and others. This will enable counsel to document petitioner's history in a legally meaningful way to establish the existence of mitigation evidence denied the jury.

Petitioner has described herein only the most obvious areas requiring further investigation and development. Petitioner's case is one that has been under-investigated throughout the trial and the state habeas corpus proceedings. Thus, counsel is at the very earliest stages of investigation and has only recently been assigned to represent petitioner. The unknown factual issues are so numerous that they pose extraordinary tactical and practical disadvantages to petitioner in his effort to file a properly pled federal habeas corpus petition in a legal framework that disfavors successive petitions. *See McFarland v. Scott*, 114 S. Ct. 2572, 2574 ("[t]he habeas petition, unlike a complaint, must allege the factual underpinning of the petitioner's claims . . . Furthermore, district courts are authorized to summarily dismiss petitions which appear on their face to be frivolous.") (O'Connor, J., concurring in part and dissenting in part). Thus, the assistance of experts, particularly an investigator and a mitigation specialist, are required to help petitioner discover and develop as yet unknown facts to support his claims. Without the assistance of experts, petitioner will not benefit from true federal collateral review of his conviction and sentencing as required by law.

IV.

Pathologist

Williams was convicted of the capital murder of both Morris and Mary Keller. Under well-established Virginia law only the actual perpetrator ("trigger man") may be convicted of capital murder. *Rogers v. Commonwealth*, 242 Va. 307, 410 S.E.2d 621 (1991).

The Commonwealth's pathologist testified at Williams' trial that Mr. Keller received three head wounds from a .38 caliber pistol and that either of two of those wounds alone could have been fatal. The same pathologist testified that Mrs. Keller received three head wounds, one from a .357 magnum pistol and two from a .38 caliber pistol, and that any of the three shots alone could have been fatal. Cruse and Williams gave conflicting testimony regarding the number of shots each fired and who fired the .38 caliber pistol.

Williams had no independent pathologist at the time of trial or thereafter to review the physical evidence, medical reports, testimony, and conclusions of the Commonwealth's pathologist. If the Commonwealth's pathologist was incorrect regarding the cause and nature of the Kellers wounds, there is a reasonable probability that Williams did not fire the fatal shots at either Mr. Keller or Mrs. Keller. In order to properly investigate and discover potentially exculpatory forensic evidence, Williams requires the services of a qualified forensic pathologist. The same pathologist must also review the evidence concerning the four Prince Edward County victims.

* * *

VII.

Conclusion

The services of a neuropsychologist, an investigator, a mitigation specialist, and a pathologist are reasonably necessary to assist Williams in the preparation of his petition for writ of habeas corpus. Petitioner requests this Court to authorize Williams' employment of such experts pursuant to 21 U.S.C. § 848(q)(9) and (10).

MICHAEL WAYNE WILLIAMS

By /s/ Barbara L. Hartung
Counsel

James E. Moore (VSB No. 14526)
Theodore F. Adams, III (VSB No. 26708)
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
(804) 697-4127

Barbara L. Hartung (VSB No. 38062)
Virginia Capital Representation Resource Center
1001 East Main Street, Fifth Floor
Richmond, Virginia 23219

Counsel for Petitioner

[SEAL]

COMMONWEALTH of VIRGINIA

Office of the Attorney General
Richmond 23219

James S. Gilmore, III
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
804-371-8946 TDD

September 25, 1996

James E. Moore, Esquire
Christian & Barton
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095

Re: Michael Wayne Williams

Dear Mr. Moore:

This is in response to your letter dated September 23, 1996, addressed to me, Patricia Scales and Warren Von Schuch. I have advised Ms. Scales and Mr. Von Schuch, and they agree, that, because I am handling the habeas corpus proceedings involving Michael Williams, I should be the one to respond to your letter.

In your letter – which in substance is much like a discovery request that a defense attorney would file prior to trial – you ask that Ms. Scales, Mr. Von Schuch and I review our files for evidence favorable to Williams. Eric White, who represented Williams in his state habeas proceedings, sent us a similar letter, and I will give you a similar response.

Williams' trial attorneys filed a lengthy discovery request prior to trial (R. 44) and the Commonwealth

responded to that request at that time. This case, however, is no longer in a posture where the Commonwealth is a "prosecutor." You are about to file a civil habeas corpus petition in which the Commonwealth will be the named respondent. I know of no binding authority that requires the Commonwealth, as the respondent in a civil habeas proceeding, to comply with a request from the petitioner to search the State's files for favorable evidence.

With best wishes, I remain

Very truly yours,

/s/ Donald R. Curry
Donald R. Curry
Senior Assistant Attorney General
Criminal Litigation Section

cc: The Honorable Patricia D. Scales
The Honorable Warren Von Schuch

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Williams,

Civil No. 3:96-CV-529

v.

J.D. NETHERLAND, Warden,
Mecklenburg
Correctional Center,

Respondent.

INITIAL PETITION OF MICHAEL WAYNE WILLIAMS UNDER 28 U.S.C. § 2254 FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY AND UNDER A SENTENCE OF DEATH[1]

Michael Wayne Williams, a person now in the custody of the Commonwealth of Virginia and under a

[1] In prior Orders, this Court directed that petitioner file his petition for a writ of habeas corpus on or before November 20, 1996. Petitioner, under protest, is complying with the Court's Orders and is filing this Initial Petition on November 20, 1996. However, petitioner does not thereby waive his right to file up to one year form [sic] April 24, 1996. See Petitioner's pending Motion For Recognition That Virginia Is Not An Opt-In State And That Petitioner Has A Federal Statutory Right To File His Petition For Writ of Habeas Corpus Up To One Year From April 24, 1996. Furthermore, by filing this initial petition, petitioner does not waive his rights to expert assistance in the preparation of his petition. An interlocutory appeal related to his application for such assistance was dismissed by the Fourth Circuit Court of Appeals, on November 19, 1996. Petitioner intends to renew his motion for the appointment of experts and to amend this Initial Petition.

sentence of death, hereby petitions this Court under 28 U.S.C. § 2254 for a Writ of Habeas Corpus. Williams states that he is in custody in violation of the Constitution or

* * *

GROUNDS FOR RELIEF

I. JUROR MISCONDUCT VIOLATED WILLIAMS' RIGHTS TO AN IMPARTIAL JURY AND TO DUE PROCESS OF LAW

A. JUROR STINNETT

Williams was denied his constitutional rights to be tried by an impartial jury and to be tried based only on the evidence presented at the trial. These rights were violated when the juror who served a jury forewoman failed to reveal during voir dire that one of the Commonwealth's witnesses, Deputy Sheriff Claude B. Meinhard, was her former husband and the father of her four children.[12] Meinhard was one of two officers who

[12] A copy of the divorce decree in *Meinhard v. Meinhard* and a copy of the marriage license and certificate for Harold Dewey Stinnett and Bonnie Baker Meinhard are attached as petitioner's Ex. A. As reflected by the divorce papers, Mr. Meinhard was represented by Robert G. Woodson, Jr., then a private attorney, and later one of the two prosecutors at Michael Williams' capital trial. The divorce decree was granted and signed by Judge Snoddy, the same judge who presided at petitioner's capital trial and sentenced him to death.

Juror Stinnett appeared on the prospective juror list as "Bonnie Baker Stinnett," and thus her relationship to Meinhard was not apparent.

Based on these same facts, petitioner also raises a claim of prosecutorial misconduct at Claim IV-A.4.

interviewed the co-defendant, Jeffrey Cruse, when Cruse confessed to the Keller murders and implicated Williams. Meinhard testified at Williams' trial about his investigation of the Keller homicides. Although the Commonwealth's Attorney, Woodson, had represented Meinhard in his divorce proceeding, Woodson also failed to reveal the relationship between Meinhard and the juror, Bonnie Stinnett, to defense counsel or the court. As a result, Williams could not conduct a meaningful voir dire, was unaware of this basis for challenges for cause and peremptory challenges, and was denied his right to an impartial jury and a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

Stinnett never revealed her relationship to Meinhard. She was asked the following questions and gave the following responses during *voir dire*[13]:

> THE COURT: Have you or any member of your immediate family ever been represented by any of the aforementioned attorneys [Mr. Woodson, Mr. Von Schuch, Mr. Ford, or Ms. Carrico]?
>
> JURORS: (Two [Stinnett and Carter] have no affirmative response.)
>
> MR. CHICK: Yes.

R. 575.

* * *

> THE COURT: Are any of you involved in law enforcement?

[13] The complete *voir dire* of this juror appears at R. 574-597.

> JURORS: (No affirmative response.)
>
> THE COURT: Are any of you related to the following people who may be called as witnesses . . . Deputy Sheriff Claude Meinhard . . .
>
> JURORS: (No affirmative response.)

R. 582-83.

Thus, Stinnett had at least three opportunities to set forth her relationship to Meinhard – when asked if any attorney in the case had represented her or her family, when asked if she was involved in law enforcement, and when asked if she was related to Claude Meinhard. Stinnett remained silent.[14] The prosecutor Woodson failed to elicit

[14] Defense counsel had requested more extensive questioning on voir dire than the court granted. Defense counsel proposed the following questions:

> 6. Mr. Woodson, in addition to being Commonwealth's Attorney for Cumberland County, is also engaged in the private practice of law. Is Mr. Woodson now, or has he ever acted as your attorney or represented you with respect to any matters?
>
> 7. Is Mr. Woodson, now, or has he *ever represented a party opposed to you* in any legal matter?

R. 140. (Emphasis added.)

> 9. Are any of you friendly with, associated with or related to anyone associated with the Commonwealth's Attorney's office, the Cumberland County Sheriff's Department, the Virginia State Police or any other law enforcement agency?
>
> 13. The witnesses likely to testify in this case are the following:

this information from Stinnett and never advised the court or defense counsel of his knowledge or the juror's concealment of her relationship to Meinhard.

Stinnett's failure to state that she was Meinhard's former wife is evidence of her lack of objectivity and impartiality. The Fourth Circuit Court of Appeals has recognized that deliberate concealment on *voir dire* deprives a defendant of his right to a fair trial and mandates reversal of the conviction:

> Certainly when possible non-objectivity is secreted and compounded by the deliberate untruthfulness [footnote omitted] of a potential juror's answers on *voir dire*, the result is deprivation of the defendant's rights to a fair trial. [The juror] by his concealment impaired the right of [the defendants] to exercise intelligently a peremptory challenge to remove a juror who was suspected of being partial [footnote omitted].

United States v. Bynum, 634 F.2d 768, 771 (4th Cir. 1980). In *Bynum*, the juror had failed to reveal that family members had been convicted of criminal offenses. *See also United States v. Rucker*, 557 F.2d 1046 (4th Cir. 1977) (voir dire that has the effect of impairing the defendant's ability to

---

> (list witnesses)
>
> Do you known [sic] any of these witnesses? Are you related by blood or by marriage or are you friends with any of these witnesses?

R. at 140. Defense counsel objected to the court's denial of all disallowed questions. R. at 500.

exercise intelligently his challenges is ground for reversal, irrespective of prejudice); *United States v. Brown*, 799 F.2d 134 (4th Cir. 1986) (same).

The Second Circuit Court of Appeals reached the same result in *United States v. Colombo*, 869 F.2d 149 (2d Cir. 1989), citing *Bynum*. In that case, the juror allegedly failed to reveal that her brother-in-law was a government lawyer when asked several specific questions designed to elicit that information. The juror purportedly withheld this information since she wanted to serve on the jury. In remanding the case, the Court of Appeals stated that a deliberately false answer on *voir dire*, itself a criminal act, "reflected an impermissible partiality on the juror's part." *Id.* at 151. As a result, the defendant was "prevented from intelligently exercising his peremptory and causal challenges because of the juror's intentional nondisclosure." *Ibid. See United States v. Perkins*, 748 F.2d 1519, 1531-33 (11th Cir. 1984) (refusal to disclose, *inter alia*, that juror knew defendant gives rise to presumption of actual bias); *McCoy v. Goldston*, 652 F.2d 654, 658 (6th Cir. 1981) (district court shall presume bias where juror deliberately concealed information). In petitioner's case, no remand is necessary since the fact of the relationship is demonstrated by court documents.

The Tenth Circuit Court of Appeals affirmed the granting of the writ where a juror failed to reveal that she was involved in an abusive family situation, and the defendant was on trial for killing her abusive husband. *Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991), *cert. denied* 113 S.Ct. 1879 (1993). The Court held that the juror's dishonesty was itself evidence of bias and that the defendant had been denied the right to a fair trial. *Id.* at

1159. The juror had failed to answer a material question, and a correct response to the question would have provided a basis for a challenge for cause. *McDonough Power Equipment v. Greenwood*, 464 U.S. 548 (1984).

Had Stinnett revealed her relationship to Deputy Sheriff Meinhard, defense counsel could have challenged her for cause. The ex-spouse of a witness cannot be viewed as a neutral and impartial juror, who is charged with assessing the credibility of witnesses. *United States v. Brown*, 799 F.2d 134 (4th Cir. 1986) (juror's knowledge of witnesses is relevant to issue of impartiality); accord *United States v. Washington*, 819 F.2d 221 (9th Cir. 1987) (reversible error to refuse to ask prospective jurors if they know prosecution's witnesses). Petitioner's ability to exercise his right to peremptory challenges was also impaired given Stinnett's failure to answer honestly. "The denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice[.]" *Swain v. Alabama*, 380 U.S. 202, 2190 (1965); *Knox v. Collins*, 928 F.2d 657, 661 (5th Cir. 1991); *United States v. Rucker, supra*, at 1049.

Stinnett's impartiality and credibility were further drawn into question when she denied hearing or reading any news stories or reports about the defendant or the case. R. at 577. Stinnet is educated and is a high school teacher in the community. The Keller murders were highly publicized in this small community. It is simply implausible that she had no prior knowledge of the case. Her failure to provide truthful answers further demonstrates her actual bias.

Juror bias constitutes a structural defect in the trial process and is not amenable to harmless error analysis. Such an error infects the entire trial process and requires automatic reversal of the conviction and sentence. *Brecht v. Abramhamson*, 507 U.S. 619 (1993); *Arizona v. Fulminante*, 499 U.S. 279 (1991). For these reasons, the writ must be granted as to Williams' conviction and sentence.

B. JUROR BLANTON

A hearing is required on the possible introduction of extrajudicial evidence by a juror whose law enforcement husband had, unknown to the trial court, arrested the petitioner on several occasions. Although the jury was sequestered during the trial itself, the jurors were permitted to return home after being chosen from the venire, i.e., *after* they learned the identity of the defendant and the nature of the trial. No hearing has ever been conducted to determine whether the juror in question – Joan K. Blanton, married to a Virginia State Trooper – received information from her husband about the petitioner that night or shared any resulting information later with her fellow jurors. Because the strong possibility of extrinsic evidence here implicates petitioner's most fundamental rights, petitioner should be granted a hearing to determine what information was introduced and whether a new trial or sentencing is warranted.

It should be noted that Joan Blanton gave an affidavit for purposes of state habeas. Respondent's State Habeas Brief. Exhibit E. In that affidavit, Blanton stated that she answered the trial court's voir dire questions truthfully and, during the trial, did not know of her husband's

arrests of Williams. But this seven-sentence affidavit, which was offered at the request of the Commonwealth after Williams discovered the problem during his direct appeal, must be considered too thin a wedge with which to block an evidentiary hearing on the subject. The state courts permitted the Commonwealth to use this affidavit to settle the issue. Williams has never had the opportunity to interview Blanton or to develop her testimony or cross examine her before a trier of fact. As demonstrated below, this issue goes to the very core of the Constitution's guarantees of due process and fair trial, and it must not be dismissed without, at a minimum, a full evidentiary hearing on the matter.

The rights implicated by possible extrinsic evidence in this context are the most fundamental in criminal law: confrontation, cross examination and counsel, among others. The central concern of the Sixth Amendment's confrontation clause is to assure the reliability of evidence against a criminal defendant by subjecting that evidence to rigorous testing in an adversary proceeding. *Maryland v. Craig*, 497 U.S. 836, 845 (1990). The Amendment guarantees a defendant the opportunity to examine and confront any evidence via a "personal examination." *Id.* Sixth Amendment rights are always implicated when a juror introduces evidence which has not been admitted at trial, and information not part of the proper record is "presumptively prejudicial." *Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2nd Cir. 1994), *citing Remner v. U.S.*, 347 U.S. 227, 229, 98 L.Ed. 654 (1954).

In the Fourth Circuit, the *Remner* presumption of prejudice is particularly strong. *E.g., Stockton v. Commonwealth*, 852 F.2d 740, 744 (4th Cir. 1988); *U.S. v. Barnes*, 747

F.2d 246, 250 (4th Cir. 1984). The standard in the Fourth Circuit for determining whether the defense was prejudiced is clear: if there is a reasonable possibility that the jury's verdict was *influenced* – not controlled, but merely influenced – by improper material before it, then the defense is prejudiced and a new trial is warranted. *Barnes*, 747 F.2d at 251. The burden is on the government to prove harmlessness, and prejudice is strongly presumed. *Id.* at 251.

Stockton and *Barnes*, applied to the facts of this case, indicate that petitioner Williams is at a minimum entitled to an evidentiary hearing in this Court on the issue of extrinsic evidence. Juror Blanton returned home the night after her selection well aware of the sensational status of case she was about to hear – like every juror, she had been exposed to great publicity and remembered hearing about the case in the media. *E.g.*, R. 635. Blanton was already deeply connected to the case: she had attended high school in Keller's class and knew him by his familiar nickname, "Kippy" (R. 628); she had once known the petitioner's mother and knew the petitioner himself as a child (R. 639-40); and Blanton herself had been the victim of sexual abuse (R. 638-39). It strains credulity – or at the very least should not be presumed on habeas review – that such a juror would not mention such a case to her spouse that evening at home. And the obvious product of that mention – a connection to her husband's arrestees – would have extremely prejudiced the defense.

The key issue to the prosecution at the sentencing phase was future dangerousness, and at that point the petitioner's other offenses were admitted. However, Blanton provides an opportunity by which such information

could have seeped into the jury at the guilt phase, which could have seriously undermined the petitioner's credibility. Because Williams' credibility was crucial if the jury were to disbelieve Cruse's account and find that Williams was not the triggerman, this direct avenue for biasing the jury must be explored at some point in the appeals process.

Stockton and *Barnes*, while factually distinct, involve the same underlying rights as Williams' case. In *Barnes*, physical exhibits improperly reached the jury, and one exhibit contradicted the defendant's testimony on his whereabouts by showing the locations from which phone calls were made. 747 F.2d at 249-50. Similar to Williams' case, in *Barnes* it was not known whether the jury used the information to undermine the defendant's credibility, but only that the information was available. *See id.* at 250. And *Barnes* was a non-capital case; therefore, in the death penalty context, the court must be at least as strict.

Along the same lines, *Stockton* involved a particularly egregious comment but is nonetheless applicable to the case at hand. In *Stockton*, several jurors while on their lunch break heard a restaurant employee state, upon learning of their role in a capital murder trial, that "they ought to fry the son-of-a-bitch." 852 F.2d at 742. While the strength of any statement by the tainted juror in the present case is of course unknown, *Stockton* is similar because in that case as in the current one, the trial Court failed to make any finding or inquiry into the impact of the statement. *Id.* at 745. The Fourth Circuit found that a prejudicial statement made to the jury mandated an evidentiary hearing on habeas, *id.*, and while it did not disturb the sentence of guilt, the Fourth Circuit did affirm

a reversal and remand on the capital sentence phase. *Id.* at 749.

This Court would not tolerate a trial judge's permitting a closed-door session in which the jury spoke with a key prosecution witness at length, then be satisfied by a one-page affidavit offered months later to the effect that nothing untoward transpired. Blanton is, or could be, such a witness. Williams has been permitted no opportunity to cross-examine or confront this potential accuser, a violation of his Sixth Amendment rights, despite the fact that evidence introduced by a juror is presumptively prejudicial. It must be emphasized that the standard for presuming prejudice is only that there exists a reasonable possibility that the outcome was merely influenced by Blanton. Such a possibility exists and entitles Williams at a minimum to an evidentiary hearing or a new sentencing phase.

The error present in all these cases he [sic] introduction of extrinsic material facts may have occurred in petitioner's case based on information conveyed to juror Blanton. Petitioner's rights to confrontation, a fair trial, and due process as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution may have been compromised. Petitioner requests a hearing on this issue and an opportunity to conduct investigation and discovery prior to such hearing.

* * *

IV. PROSECUTORIAL MISCONDUCT DEPRIVED WILLIAMS OF A FAIR TRIAL AND DUE PROCESS.

A. GUILT PHASE

1. THE COMMONWEALTH FAILED TO DISCLOSE ITS AGREEMENT WITH THE CHIEF PROSECUTION WITNESS, CRUSE, AND ACTIVELY MISLED THE JURY REGARDING AN AGREEMENT WITH CRUSE

Williams' trial counsel filed a discovery motion requesting, among other things, all *Brady* information, including information concerning any formal or informal agreement or understanding with any witness for the Commonwealth. R. 14, 18-19. The trial court denied the discovery motion, but ordered the Commonwealth to comply with all discovery requirements under the Rules of the Supreme Court of Virginia and relevant case law. R. 54. The Commonwealth was therefore required to disclose any exculpatory evidence or any evidence that could be used to impeach the Commonwealth's witness. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 115 S.Ct. 1555 (1995); *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988). Any formal or informal agreement between the Commonwealth and Jeffrey Cruse, Williams' co-defendant, was plainly within the scope of *Brady* and had to be disclosed.

Prior to trial the Commonwealth informed Williams' counsel that the Commonwealth had at one time reached a plea agreement with Cruse, that the agreement had been breached by Cruse, and that no other agreement existed. No copy of any written agreement was produced,

and, until that agreement was introduced by the Commonwealth at trial, Williams' counsel thought the original agreement had been oral. Exhibit to State Habeas Petition, Affidavit of R. Donald Ford, Jr.

At trial, the Commonwealth elicited from Cruse on direct and redirect examination that he was charged with capital murder and that an agreement with the Commonwealth not to seek the death penalty had been withdrawn because he had not confessed to his involvement in the rape of Mrs. Keller in his original statements. R. 954, 973-976. The Commonwealth introduced into evidence as Commonwealth's Exhibit 13 the original and supposedly void written agreement with Cruse dated March 2. 1993. R. 263. The agreement provided that in return for Cruse's cooperation and testimony against Williams, the Commonwealth would not seek the death penalty against Cruse. R. 263.

Thus, the jury in Williams' case was left with the clear impression that there was no longer any agreement with Cruse for leniency in return for his testimony against Williams.

Notwithstanding the Commonwealth's trial posture that there was no agreement with Cruse, the record in Williams' and Cruse's cases, considered as a whole, demonstrates that there was such an agreement.

On March 14, 1993, Cruse pled guilty to the capital murder of Mrs. Keller. By agreement with the Commonwealth, the charge of first degree murder of Mr. Keller was amended to charge Cruse with participation as a principal in the second degree. Exhibit to State Habeas Petition, Transcript, March 14, 1994, at pp. 10-13. Cruse's

guilty plea came just two months after Williams' conviction and before a trial date was even established in Cruse's case. On March 25, 1994, the Commonwealth's Attorney for Prince Edward County wrote to Cruse's defense counsel offering to testify on Cruse's behalf at sentencing in return for Cruse's cooperation in prosecuting Williams in the Prince Edward case. *See* Exhibit e. On April 26, 1994. following a recommendation of the Commonwealth's Attorney for Cumberland County that Cruse's life be spared, the trial court sentenced Cruse to life in prison on his guilty plea to capital murder. Transcript, April 26, 1994. The Commonwealth based its sentencing recommendation primarily upon Cruse's cooperation in convicting Williams. *Id*. This sequence of events in itself strongly suggests that an agreement between Cruse and the Commonwealth existed when Cruse testified against Williams.

Even more telling, however, are statements of the Commonwealth's Attorney made during Williams' trial. After eliciting from Cruse testimony that his original agreement with the Commonwealth had been withdrawn, the Commonwealth's Attorney sought to emphasize the absence of any agreement, questioning Cruse as follows:

> Q: You've indicated to the jury you're charged with capital murder right now; is that correct?
>
> A: Correct.
>
> Q. Is it your understanding that *the Judge is going to decide whether you live or die*?
>
> A. Correct.

R. 976 (Emphasis supplied).

These questions and answers make it abundantly clear that at the time of Williams' trial both the Commonwealth and Cruse knew that Cruse would plead guilty to capital murder, thereby waiving his right to a jury and requiring sentence to be imposed by the Court. The conclusion is, therefore, inescapable that the Commonwealth and Cruse had an understanding regarding a sentencing recommendation by the Commonwealth.

The final argument of the Commonwealth's Attorney at the guilt phase of Williams' trial also supports the conclusion that there was an agreement with Cruse. Attempting to persuade the jury that Cruse's testimony against Williams was not motivated by any agreement, the Commonwealth's Attorney argued:

> . . . he [Cruse] sits here today facing the death penalty; he sits here facing capital murder. two counts of capital murder. *And like he told you right now his back is against the wall; if he lies, he dies*, and that is his situation. R. 1278 (Emphasis supplied).

The only reasonable inference from the foregoing statement of the Commonwealth's Attorney is that there was a direct relationship between the content of Cruse testimony and his sentence on charges of capital murder. Unless Cruse told the story the Commonwealth wanted, he would face the death penalty.

Looking at the record as a whole, there can be no reasonable doubt that the Commonwealth had an agreement with Cruse that, in exchange for his expected testimony against Williams, he would receive a recommendation from the Commonwealth for a life sentence as opposed to the death penalty when he pled guilty to

capital murder. The Commonwealth's failure to disclose such an agreement to Williams' counsel prior to trial severely limited their ability to effectively cross-examine the Commonwealth's key witness against Williams. As a result, Williams was denied due process and a fair trial. *Bagley, supra.* Given the critical role that Cruse played in the Commonwealth's case against Williams. there is a reasonable probability that the outcome of Williams' trial would have been different if the agreement had been disclosed. *United States v. Bagley,* 473 U.S. at 682; *Kyles v. Whitley,* 115 S.Ct. at 1566. The writ should be granted.

2. THE COMMONWEALTH FAILED TO DISCLOSE A PSYCHIATRIC EVALUATION OF CRUSE CONTAINING BRADY INFORMATION

In September 1993, while incarcerated for the Keller murders, Cruse, the Commonwealth's key witness against Williams, was evaluated by Mario Gomez, a psychiatrist affiliated with the Goochland-Powhatan Community Services Board. An evaluation based upon an interview with Cruse reports that "[Cruse] has little recollection of [the Keller murders], other than vague memories, as he was intoxicated with alcohol and marijuana at the time." *See* Exhibit D.

The Commonwealth would have certainly known of the September 1993 psychiatric report concerning Cruse prior to Williams' trial in January 1994. Notwithstanding the Court's September 15, 1993 order to disclose all *Brady* material, the Commonwealth failed to disclose the psychiatric report.

The statement in Dr. Gomez's report concerning Cruse's intoxication at the time of the Keller murders and his poor recollection was obviously *Brady* information which had to be disclosed by the Commonwealth to Williams' counsel. *United States v. Bagley,* 473 U.S. 667 (1985). Cruse's testimony was absolutely vital to the Commonwealth's ability to convict Williams of capital murder. The Gomez report would have provided Williams' counsel with a powerful tool for cross-examination of Cruse's critical testimony against Williams concerning triggerman issues.

There is a reasonable probability that if the Cruse psychiatric report had been disclosed the result of Williams' trial would be different. Williams was denied his right to a fair trial guaranteed by the Fifth and Fourteenth Amendments. *United States v. Bagley,* 473 U.S. 667 (1985); *Kyles v. Whitley,* 115 S.Ct. 1555 (1995). The writ should be granted.

* * *

5. THE COMMONWEALTH FAILED TO REVEAL AT VOIR DIRE THAT STINNETT'S FORMER HUSBAND WOULD BE A TRIAL WITNESS AND THAT SHE HAD FAILED TO REVEAL THEIR RELATIONSHIP TO THE COURT AND COUNSEL.

As set forth in Claim I-A, *supra,* juror Stinnett failed to reveal that one of the Commonwealth's witnesses, Claude Meinhard, was her ex-husband and the father of her four children. Stinnett had several opportunities to state her relationship to Meinhard during voir dire and

failed to do so. She was, for example, asked if any of the attorneys participating in the trial had represented her or any member of her family. Stinnett failed to state that Commonwealth's Attorney Robert G. Woodson, Jr., when in private practice, had represented Claude Meinhard during their divorce proceedings in 1979.

Prosecutor Woodson also failed to advise the trial court of his relationship to Claude Meinhard and thus to juror Stinnett. An attorney may not remain silent when a prospective juror provides a false or misleading answer during voir dire. Woodson was aware of Stinnett's relationship to Meinhard based on his own representation of Meinhard. Moreover, Stinnett's relationship to Meinhard was well-known in the community as evidenced by the fact that some jurors still referred to Stinnett by her former name, Meinhard. Pet. Ex A.

Woodson's silence deprived Williams' counsel of information required to challenge Stinnett for cause. She was not an impartial juror, and her bias was demonstrated further by her failure to provide truthful and complete answers on voir dire. Woodson was guilty of prosecutorial misconduct for failure to advise the court and defense counsel of Stinnett's relationship to Meinhard. His conduct does not fall under the trial error analysis of *Brecht v. Abrahamson, supra,* since the presence of Stinnett on the jury created a structural defect in the trial and cannot be subject to harmless error analysis. *See Arizona v. Fulminate,* 499 U.S. at 289-90 (1991). As a result, Williams was denied his right to an impartial jury, due process, and a fair and impartial trial at both guilt and sentencing in violation of his rights under the Fifth, Sixth,

Eighth, and Fourteenth Amendments to the U.S. Constitution. The writ must be granted.

* * *

9. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO NUMEROUS IMPROPER AND MISLEADING STATEMENTS BY THE COMMONWEALTH IN OPENING AND CLOSING ARGUMENTS DURING THE GUILT/INNOCENCE PHASE OF THE TRIAL.

Both Commonwealth's Attorneys, Robert Woodson and Warren Von Schuch, delivered arguments during the guilt/innocence phase of the trial. Counsel failed to object to even one of the numerous misrepresentations and other instances of improper arguments. Counsel was ineffective in failing to object to or argue numerous misrepresentations and other instances of improper opening and closing arguments by the Commonwealth at the guilt phase of the trial.

In its opening argument, the Commonwealth informed the jury that the victims' place of business was next to the Williams' mother's house. R. 787. That fact was never established by any testimony, but was a significant part of the Commonwealth's case on motive. Williams allegedly chose the victims because he knew them and their habits. As such, this was argument of facts not in evidence, a misrepresentation of the evidence, and, therefore, objectionable.

During closing argument, the prosecution argued that it is "uncontradicted that the victims had not been

out that night". R. 1249. Their whereabouts prior to the offenses were never discussed. As such, this was argument of facts not in evidence, a misrepresentation of the evidence, and, therefore, objectionable.

The vaginal swab taken from Mrs. Keller revealed the presence of semen that could not have been that of her husband. In closing argument, the Commonwealth argued that George Li, the Commonwealth's DNA expert, testified that both Cruse and Williams could have raped Mrs. Keller, (R. 1256.) and did rape Mrs. Keller (R. 1257.) Li actually testified that he could not tell whether Williams had intercourse with the victim because the DNA taken from Cruse would have masked Williams. As such this was a misrepresentation and misstatement of the evidence, and, therefore, objectionable.

In closing at the guilt phase, the Commonwealth argued that Lisa Schiermeier, the Commonwealth's serologist, testified that there was "no question that Mr. Williams raped Mrs. Keller". R. 1264. Her testimony was actually that she found semen consistent with Williams' blood type in Mrs. Keller's vaginal swab. As such, this was a misstatement and misrepresentation of the evidence, and, therefore, objectionable.

In his closing argument, Commonwealth's Attorney Von Schuch, mentioned Cruse's reaction to the pictures of the Kellers he was shown during the investigation. Von Schuch offered his own testimony in argument that "I asked him what happened and he said he lost it, and, boy did he ever. And when he got on the witness stand here, he broke down again, . . . " R. 1277. Von Schuch, without opposition, characterized Cruse's initial reaction as being

even more dramatic than Cruse's reaction at trial. The record is silent as to any emotional reaction Cruse may have had when improperly shown pictures on redirect examination, R. 978-979, was an improper and prejudicial injection of his argument personal opinions regarding the credibility of witnesses and evidence, and therefore, objectionable.

In that portion of the Commonwealth's closing argument delivered by Woodson, the jury was told that law enforcement officers had no evidence to charge Cruse with the murders after he made the statement in which he omitted mention of the rape of Mrs. Keller. R. 1253. Yet Cruse had previously told law enforcement officials that he had shot Mrs. Keller in the head. His omission of the rape did nothing to void the effect of his admissions to other crimes. This argument was a misstatement, and misrepresentation of the evidence and, therefore, objectionable.

In his closing argument, Commonwealth's Attorney Woodson repeatedly and improperly injected his own opinion as to the credibility of witnesses and evidence. Referring the Commonwealth's witness, he argued that "these are believable people" R. 1262. Woodson further argued that Cruse was "telling it like it is", R. 1263. Woodson also improperly interjected personal experience and opinion. "If you scale this case on 1 to 10, I will tell you this is a maximum case, it is a serious case." R. 1264. As such, these statements were objectionable.

During the rebuttal portion of the Commonwealth's closing argument at the guilt/innocence phase of the trial, Von Schuch, argued that Cruse

> [s]its here today facing the death penalty; he sits here facing capital, two counts of capital murder. And like he told you right now, his back is against the wall; *if he lies, he dies*, and that's his situation. (R. 1278). (Emphasis added)

The last portion of the statement is unequivocal. The only possible interpretation of this argument is that if Cruse tells the truth, he will live. If true, it is clear that Cruse will be rewarded for his testimony. This was a direct contradiction to the evidence offered by the Commonwealth during its examination and redirect examination of Cruse that he had no "deal.". It was a material misstatement and misrepresentation of the evidence and, therefore, clearly objectionable.

The net effect of this series of misstatements, misrepresentations and personal opinions was extreme prejudice to Williams. Each of these instances and statements would have called for cautionary instructions if not legitimate requests for a mistrial. A mistrial motion should have been made where the Commonwealth injected their personal opinions.

Even if the individual misstatements, misrepresentations or personal opinions were not sufficient to grant a mistrial, their cumulative effect, if considered on appeal, would have most likely resulted in a reversal. Counsel's failure to object deprived Williams of a valid issue on appeal.

No verdict rendered after such arguments can be considered reliable. As none of these mistakes, misrepresentations or improprieties were objected to, Williams was denied effective assistance of counsel, in violation of

his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

* * *

WHEREFORE, for the reasons set forth above Williams prays that this Court grant the following relief:

a. Issue a writ of habeas corpus commanding Respondent to bring Williams before the Court to the end that he may be discharged from his unconstitutional confinement and/or be relieved of his unconstitutional sentence of death;

b. Conduct a plenary hearing on this Petition and accord Williams the right to present witnesses, exhibits, and argument of counsel;

c. Grant Williams the authority to obtain subpoenas *in forma pauperis* for witnesses and documents necessary to prove the facts as alleged in this Petition, and to permit any other discovery allowed by law;

d. Grant Williams leave to amend this Petition in light of any facts uncovered through further investigation, discovery or testimony;

e. Allow Williams a period of at least ninety (90) days, which period shall commence after the completion of any hearing this Court determines to conduct, in which to brief the issues of law and facts raised by Williams;

f. Grant Williams such other relief to which he may be entitled or which the court deems just and proper.

MICHAEL WAYNE WILLIAMS

BY /s/ Barbara L. Hartung
Counsel

Mark E. Olive,
pro hac vice
Barbara L. Hartung,
VSB #38062
Virginia Capital
Representation
Resource Center
1001 East Main Street,
5th Floor
P. O. Box 507
Richmond, Virginia
23204-0506

James E. Moore
VSB #14526
Theodore Adams, III,
VSB #26708
Hill B. Wellford, III,
VSB #38938
Christian & Barton, L.L.P.
909 East Main Street,
Suite 1200
Richmond, Virginia
23219-3095
(804) 697-4100

November 21, 1996

INDEX TO EXHIBITS

EXHIBIT A Court Records Related To Barbara Meinhard Stinnett

EXHIBIT B Affidavit of Doris Pye

EXHIBIT C Newspaper Articles on Williams' Arrest And Trial

EXHIBIT D Psychiatric Report on Cruse Dated September 14, 1993

EXHIBIT E Commonwealth Attorney's Letter On Behalf Of Cruse, Dated March 25, 1994

Exhibit A

VIRGINIA:

IN THE CIRCUIT COURT OF CUMBERLAND COUNTY

BONNIE B. MEINHARD Complainant,

vs.

CLAUDE B. MEINHARD Defendant.

DECREE

This cause came on this day to be heard upon the Bill of Complaint, duly matured and set for hearing, upon process accepted by the Defendant, upon depositions of witnesses taken on behalf of the complainant after notice duly served upon defendant, and was argued by counsel.

And it appearing to the Court, independently of the admissions of either party in the pleadings or otherwise, that the parties were married on the 24th day of February, 1962, in the County of Gaffney, State of South Carolina,

and both parties are members of the white race; that there were four children born of the said marriage; namely, Brandon Todd Meinhard, born on May 7, 1972, William Troy Meinhard, born on January 4, 1966, Claudia Ann Meinhard, born on August 18, 1964, and Tracy Dean Meinhard, born on September 28, 1962; that the parties are over the age of eighteen years; that the complainant hereto has been an action bona fide resident of and domiciled in the State of Virginia for more than six months next preceding the commencement of this suit; and that the parties last cohabited in the County of Cumberland, State of Virginia; and that the complainant has lived separate and apart, without interruption, from the defendant since July 25, 1977.

It is accordingly ADJUDGED, ORDERED and DECREED that the complainant, BONNIE B. MEINHARD, is now absolutely divorced from the defendant, CLAUDE B. MEINHARD, from the bond of matrimony on the grounds of having lived separate and apart, without interruption, and without cohabitation for over one year; and the bond of matrimony created by this marriage between the parties on February 24, 1962, is dissolved.

And it appearing to the Court that the complainant is a proper and fit person to have custody of the children born of the aforesaid marriage, it is further ADJUDGED, ORDERED and DECREED that the custody of Brandon Todd Meinhard is granted to the complaint with reasonable visitation rights to the defendant and that all further matters concerning the custody and support of Brandon Todd Meinhard, William Troy Meinhard, Claudia Ann Meinhard and Tracy Dean Meinhard be and are hereby

referred to the appropriate Juvenile and Domestic Relations Court having jurisdiction of such matters.

And this cause is removed from the docket.

Enter this 10th day of Sept., 1979.

/s/ Illegible
JUDGE

I ask for this:

/s/ Robert G. Woodson, Jr.
Robert G. Woodson, Jr.
Counsel for Complainant

Seen:

/s/ Claude B. Meinhard
Claude B. Meinhard

Entered
16/71

COMMONWEALTH OF VIRGINIA

MARRIAGE REGISTER

COPY A FOR CLERK OF COURT

CITY OR COUNTY OF Cumberland

NAME OF COURT Circuit

CLERK'S NUMBER 24

GROOM

1. FULL NAME OF GROOM

(first)	*(middle)*	*(last)*
Harold	Dewey	Stinnett

2. AGE 38 YEARS

3. DATE OF BIRTH *(Month, Day, Year)*

1-20-50

4. PLACE OF BIRTH *(state or foreign country)*

Virginia

5. RACE White

6. NUMBER OF THIS MARRIAGE Second

7a. MARITAL STATUS *(if previously married)*

WIDOWED [ ] DIVORCED [X]

7b. DATE LAST MARRIAGE ENDED

July 1977

8. EDUCATION 9

9a. USUAL RESIDENCE STREET ADDRESS OR RT. NUMBER

Route 1, Box 32

9b. CITY OR TOWN OF RESIDENCE Cartersville

9c. COUNTY Cumberland

9d. STATE (OR FOREIGN COUNTRY) Virginia

10. NAME OF FATHER David Wilson Stinnett

11. FULL MAIDEN NAME OF MOTHER

Martha J. McCarter

BRIDE

12. PRESENT NAME OF BRIDE

(first)	*(middle)*	*(last)*
Bonnie	Baker	Meinhard

MAIDEN SURNAME Baker

13 AGE 46 YEARS

14. DATE OF BIRTH *(Month, Day, Year)*

11-15-41

15. PLACE OF BIRTH

Virginia

16. RACE White

17. NUMBER OF THIS MARRIAGE *(first, second, etc.)*

second

18a. MARITAL STATUS, *(if previously married)*

WIDOW [ ] DIVORCED [X]

18b. DATE LAST MARRIAGE END 1979

19. EDUCATION *(Specify only highest grade completed)*

(Elementary or Secondary 0-12) 12

College (1, 4 or 5+) 4+

20a. USUAL RESIDENCE STREET ADDRESS OR RT. NUMBER

Route 1, Box 32

20b. CITY OR TOWN OF RESIDENCE Cartersville

20c. COUNTY Cumberland

20d. STATE (OR FOREIGN COUNTRY)

Virginia

21. NAME OF FATHER William Abernathy Baker

22. FULL MAIDEN NAME OF MOTHER

Ann Marie Rhodes

MARRIAGE LICENSE

23. TO ANY PERSON LICENSED TO PERFORM MARRIAGES

* * *

Date Issued September 12, 1988

License Expires Sixty Days After Above Date

Date Received by Clerk of Court from Officiant

10-4-88

Signature /s/ Carol O. Henshaw, Deputy
Clerk of Court or Deputy

MARRIAGE CERTIFICATE

24. DATE OF MARRIAGE *(Month, Day, Year)*

October 1, 1988

25. PLACE OF MARRIAGE Prince Edward VIRGINIA

26. TYPE OF CEREMONY CIVIL [X] RELIGIOUS [ ]

STATE OF VIRGINIA

County of Cumberland, to-wit:

I, Carol O. Henshaw, Clerk of the Circuit Court of the County of Cumberland, the same being a Court of record having a seal, do hereby certify that the foregoing is a true copy of the marriage record of Haroid Dewey Stinnett and Bonnie Baker Baker [sic] Meinhard, which is of record in my said office in Marriage Register No. 4, at page 6.

In testimony whereof, I have hereto set my hand and annexed the seal of the said Court, this 22nd day of October, 1996.

/s/ Rudy C. Stout, Deputy Clerk,

The Commonwealth of Virginia,

To the Sheriff of the County of Cumberland, Greeting:

The following is a list of the names of jurors drawn pursuant to Virginia Code Section 8.01-348 and prepared under Code Section 8.01-361 for the trial of the case of Commonwealth vs. Michael Wayne Williams accused of felonies and all other cases to be tried the Sept. 1993 Term of this Court. You will notify ____ of the persons on said list to attend the Circuit Court of the County of Cumberland on the 3rd day of January, 1994, and you will then and there make return of this list to the Clerk of the said Court, to wit:

	NAME	ADDRESS	OCCUPATION
1	Betty Farley Boggs	Route 1, Box 23 Cartersville, VA 23027	
2	Harry Moulton Chapman	Route 1, Box 2950 Farmville, VA 23901	
3	Walter Bernell Copeland	184 Cook Road Farmville, VA 23901	
4	Gary Edward Davis	721 Monroe Street Farmville, VA 23901	

5 William Michael Duker
Route 1, Box 1055
Farmville, VA 23901

6 Leroy Frederick Fahrner
410 John Randolph Road
Farmville, VA 23901

7 Alex Joseph Fazekas
802 Osborn Road
Farmville, VA 23901

8 Lottie Hatcher Goff
Route 3, Box 45B
Powhatan, VA 23139

9 Oscar Wayne Harper
1853 Cumberland Road
Farmville, VA 23901

10 Juanita Higgins Hazlegrove
Route 1, Box 1735
Farmville, VA 23901

11 Pearl P. Hickman
Route 1, Box 2370
Farmville, VA 23901

12 Christine Booker James
Route 2, Box 254
Cumberland, VA 23040

13 Walter Blanton McKay
P. O. Box 21
Farmville, VA 23901

14 James Warren Miller
Route 2, Box 141A
Cumberland, VA 23040

15 Christine Warren Morris
Route 1, Box 15
Cumberland, VA 23040

16 Joanne Smith Petty
Route 1, Box 227
Cumberland, VA 23040

17 Mary Sutton Sloan
Route 3, Box 209
Cumberland, VA 23040

18 Tiffany Latrese Smith
Route 4, Box 27
Farmville, VA 23901

19 Beverely White Spain
Route 4, Box 317
Farmville, VA 23901

20 Bonnie Baker Stinnett
Route 1, Box 32
Cartersville, VA 23027

21 Norma Quesenberry Tipton
Route 1, Box 178A
Cartersville, VA 23027

22 Robert Perry Turpin
Route 1, Box 114
Cartersville, VA 23027

23 Albert Franklin Watson, Jr.
Route 3, Box 307
Cumberland, VA 23040

24 Anne Booker Womach
703 Monroe Street
Farmville, VA 23901

25 Wilma Randolph Word
Route 4, Box 321
Farmville, VA 23901

26

27

28

Given under my hand as Clerk of the said Court, this 20th day of December, 1993

/s/ Imogine N. Tunstall, Clerk
Circuit Court of the County of Cumberland

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS **Civil 3:96CV529**

Petitioner,

v.

J.D. NETHERLAND, Warden,
Mecklenburg Correctional Center,

Respondent.

AFFIDAVIT OF DORIS PYE

I, Doris Pye, do swear and affirm that the following is true and correct to the best of my knowledge and recollection:

1. I am fifty-three years old, a resident of Harrisonburg, Virginia, and a Summa Cum Laude graduate of

James Madison University. I am licensed by the Commonwealth of Virginia as a private investigator and Private Security Services Compliance Agent. I completed the American Bar Association paralegal studies program at James Madison University in 1983, and immediately thereafter was employed by the Harrisonburg law firm of Hoover, Penrod, Davenport & Crist as a general practice paralegal and in-house investigator. My first capital murder procedure experience was acquired when I assisted David A. Penrod of that firm with *Commonwealth v. Johnson* in 1987-1988. Since that time, I completed the Commonwealth of Virginia Private Investigator training at Piedmont Virginia Community College (May of 1992), and the Department of Criminal Justice Services basic training for Private Security Compliance Agents, at the Virginia State Police Academy (July of 1992). I resigned from the Hoover firm and established a private investigative firm in August of 1992. Since 1992 I have been involved with the litigation of over 20 Virginia murder cases, including the following: five trial level court appointments as investigator where capital murder was charged; nine postconviction capital murder investigations; two privately retained first degree murder cases; one court appointment in a first degree murder charge against a juvenile; and three court appointments in U.S. district court where murder was charged.

2. On October 11 and 12, 1996, I interviewed five of the jurors from Michael Williams' capital trial. In the course of these interviews, the jurors disclosed the following information to me.

3. Three jurors (Allen, Daves, and Copeland) reported that the possibility of parole was discussed during the sentencing deliberations. Daves reported that the jurors had discussed the fact that Williams "would be out in 33 years" if he received a life sentence. Allen stated that all the jurors were concerned about the possibility of parole. Allen understood a life sentence to be 33 years and not until death. Copeland stated that several of the jurors were concerned about parole eligibility if Williams received a life sentence and Copeland believed that Williams would be released on parole.

4. Two jurors (Pipton and Allen) knew the jury forewoman, Bonnie Stinnett, as Bonnie Meinhard. Allen stated that Stinnett was the ex-wife of Claude Meinhard, now the Sheriff of Cumberland County. Allen stated that there had been discussions among the jurors concerning their surprise that Stinnett had been allowed to serve on the jury.

Further, this affiant sayeth not.

/s/ Doris Pye
DORIS PYE

Subscribed and sworn to before me on this 18th

day of November, 1996.

/s/ Ronald Illegible
NOTARY PUBLIC
My commission expires: 9/30/2000

EXHIBIT D

Goochland-Powhatan Community Services Board
P. O. Box 485
Powhatan, VA 23139
(804) 598-2200

PSYCHIATRIC EVALUATION

Client: Mr. Jeffrey Cruse

Birth Date: 12-22-67

Evaluation Date: September 14, 1993

Consulting Psychiatrist: Mario Gomez, M.D.

CHIEF COMPLAINT:

"I can't stop having nightmares and crying."

HISTORY OF PRESENTING ILLNESS:

This is a 25 year old white male, currently an inmate at the Powhatan Correctional Center, following an event in which he participated in capital murder of a couple nearby. The patient has little recollection of the event, other than vague memories, as he was intoxicated with alcohol and marijuana at the time. He reports having done LSD two months prior in large amounts, "up to 12 hits at a time", and had been doing so for the past 10 months prior to that. Patient reports he was with another individual who had a record of having murdered people. The patient felt unable to say "no" to his partner's request to rob the couple and subsequently kill them. The patient has recurrent nightmares and visualizes the face of the woman that he killed. When attempting to describe this nightmare, he breaks openly into tears and his face

reddens. He states this has been happening approximately since one week after the murder in late February, 1993, for the next 6 months up through today.

The patient was previously evaluated at a Manassas County Correctional Facility by a psychiatrist who wanted to prescribe an antidepressant, but due to his transfer, he was not prescribed anything. He continues to feel worthless as a person, placated by the guards for what he's done, bringing him into helplessness, tears and anger. He has no hope for his future and has been thinking of suicide constantly. He says there are methods such as cutting on himself. He states he has cut on himself in the past and has taken overdoses as well. He describes having feelings as if there are tingling sensations at times but no overt panic attacks, derealization or depersonalization experiences. He does describe inability to sleep, often tossing and turning, waking up, and feeling fatigued during the day.

The patient can read and write but has problems concentrating on what he reads. He has been having "a lot of anger" in his mind as he is constantly reminded of what he has done by his incarcerators. He is currently awaiting trial.

PAST PSYCHIATRIC HISTORY:

Unavailable. The patient does admit he has had severe substance abuse problems, becoming intoxicated, high on pot and LSD, dating back to his grade school years. He states he always experienced low self-esteem from being "picked on". Any letters to his counselor states that he would never hit back others that provoked him for fear of

"harming them". He admits to hallucinations during the day, as if he was "tripping" again, describing post-hallucinogen perceptive problems. He is currently not experiencing any withdrawal phenomena but states that liquor is available in the jail.

PAST MEDICAL HISTORY:

Significant for episode of hypertension in epistaxis in 1987. Has not had reoccurrence since then.

FAMILY HISTORY:

Significant for alcoholism in his older brother, who is 35 years old, as well as in his father. Apparently, his father left when the patient was age 5, and he died approximately 2 years ago from problems with alcoholism and COBD from heavy smoking.

SOCIAL HISTORY:

The patient quit school in the 9th grade. He stated he missed most of 8th grade, as he was truant and would not pay attention in class. He seemed disinterested at the time and because he felt picked on by others and would often abuse drugs instead. He is able to read and write. He was not maintained in any learning disabled classes. He was not psychologically tested for any concurrent psychiatric disorder. He says he has a girlfriend who bore him his third child, a boy, approximately two months ago, but she has not talked to him since approximately six weeks ago, further exaggerating his depression. He is currently incarcerated, as stated above.

MENTAL STATUS EXAMINATION:

Examination revealed a white male who appeared to have flat affect, low monotone speech, and was wearing prison clothing and shackles. He did not display impulsivity. He cried often and reddened his eye features during the interview, especially during topics in which he discussed the nightmares, as well as current treatment while in jail. This apparently is brought on by embarrassment. He stated he felt he might be killed if he did not follow through his partner in crime's instructions to kill the couple. He stated he always had problems saying "no" and described even allowing others to cut on him simply upon their request. He described neurovegetative symptoms of major depression and post-traumatic nightmares, recurrent in nature, of the event. He described visual misperceptions and he often hears his name being called. He denies current withdrawal symptoms.

Cognitively, he was able to recall recent and remote events well, except for black-outs when he is drinking excessively or doing LSD, in the past two years. He is able to recall three out of three objects after four minutes. He can recite serial 7's backwards with only one mistake, however, slowly. Serial 3's in the same manner. He misspelled "world" in reverse. He is able to recall the presidents back to Regan [sic]. His digit span is impaired with 5 digits forwards, 2 digits backwards. He is able to interpret most proverbs abstractly and can perform calculations rather well. He has poor insight and poor judgement.

INITIAL IMPRESSION:

Axis I	Post-Traumatic Stress Disorder with Depression R/O Attention Deficity/Hyperactivity Disorder, Adult Type Polysubstance Abuse (LSD, Cannabis, Alcohol, etc.) Probable Post-Hallucinogen Perceptive Disorder Probable Post-Hallucinogen Perceptive Disorder (Flashbacks)
Axis II	Antisocial Character Disorder
Axis III	History of Hypertension and Epistaxis in 1987
Axis IV	Severe
Axis V	GAF: 40 – 50

PLAN:

The patient will be started on Imipramine 50mg at night for 5 days, increased to 100mg at night thereafter. Start Chlorpromazie 25mg twice daily, and 50 mg at night. Will see him again in two weeks. Clinic to be contacted if patient develops dystonia, etc. Side effect profile explained to the patient and he welcomes relief of symptoms.

Mario Gomez, M.D.

MG/de

JAMES R. ENNIS
COMMONWEALTH'S ATTORNEY
PRINCE EDWARD COUNTY
ONE MILL STREET
FARMVILLE, VIRGINIA 23901

REPLY TO
P. O. BOX 266

PHONE (804) 392-1902
FAX (804) 392-7297

March 25, 1994

Don Blessing, Esquire
215 N. Main Street
P.O. Box 860
Farmville, VA 23901

RE: Jeffrey Cruse

Dear Don:

As you are fully aware by virtue of your representation of Mr. Cruse, Mr. Cruse was helpful to me in my prosecution of Michael Williams in Prince Edward County. His testimony at the preliminary hearing and his willingness to testify at the trial of these cases was certainly beneficial to my prosecutorial efforts. His cooperation with authorities in Cumberland County was critical to the eventual capture and prosecution of Michael Williams.

Should you feel that it would be of any benefit to your client, I would be willing to appear as a witness at the sentencing phase of his case and give testimony concerning his efforts and cooperation in regard to the charges against Michael Williams and the valuable assistance he rendered to the Commonwealth.

Very truly yours,

/s/ James R. Ennis
James R. Ennis

JRE/shp

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

[Caption Omitted In Printing]

AFFIDAVIT

1. I am Donald C. Blessing. I am a lawyer licensed to practice in the Commonwealth of Virginia. Together with Lee Harrison, I represented Jeffrey Cruse on his charges of capital murder and other related felonies in Cumberland County.

2. Jeffrey Cruse's co-defendant was Michael Wayne Williams. During Williams' state habeas corpus proceedings, I submitted an affidavit in which I stated: "At the time of Williams' trial, Cruse had no plea agreement with Commonwealth. Cruse testified truthfully at [Williams'] trial that he had no plea agreement, that he remained charged with capital murder for the Cumberland offenses, and that he was subject to a possible death sentence." This statement was true then, and it is true now.

3. On March 5, 1997, I was contacted by Williams' federal habeas counsel, Mr. James Moore. Mr. Moore later faxed to me a draft of an affidavit for my consideration. A copy of the draft is attached. Upon reading the draft, I telephoned Mr. Moore and informed him unequivocally that paragraph 5 of the draft affidavit was not true and that, during my earlier conversation with Mr. Moore. I never had told him that Cruse had "an understanding with the Commonwealth." I refused to sign the draft affidavit because the assertion made in paragraph 5 of the draft affidavit is not true.

4. I have been informed that on March 10, 1997, Williams' filed a document in federal district court which on page 32 states. "But in discussions by current counsel for Williams with Cruse's counsel about additional affidavits, Cruse's counsel has not completely refuted the possibility that some inducement from the Commonwealth existed." If this statement is intended to be a reference to the contact between myself and Mr. James Moore described above, the statement is untrue.

5. At the time Cruse testified against Williams in Cumberland County, he had no agreement or understanding, formal or informal, with the Commonwealth. At no time have I ever said or implied to Williams' habeas counsel, or to anyone else, that there was an informal agreement or understanding between Cruse and the Commonwealth.

/s/ Donald C. Blessing
Donald C. Blessing

Subscribed and sworn to before me by Donald C. Blessing this 11th day of March, 1997.

/s/ Sharon G. Palmore
Notary Public

My commission expires: October 31, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Petitioner, Civil No. 3:96-CV-529

v.

J.D. NETHERLAND, Warden,
Mecklenburg Correctional Center.

Respondent.

AFFIDAVIT OF
DONALD C. BLESSING

Donald C. Blessing, having been first sworn upon oath, states as follows:

1. I am a lawyer, licensed to practice in the Commonwealth of Virginia. My law office is located in Farmville, Virginia.

2. I was appointed to represent Jeffrey Cruse on his capital murder and other related felony charges in Cumberland County arising from the February 27, 1993 murders of Morris C. Keller, Jr. and Mary Elizabeth Keller. Lee R. Harrison, Esquire, of Cartersville, Virginia, had already been appointed to represent Cruse when I was appointed. Mr. Harrison and I were co-counsel for Jeffrey Cruse. Prior to being represented by Mr. Harrison and me, Cruse was represented by James C. Baber.

3. Before Mr. Harrison and I entered the case, Cruse and Mr. Baber had reached a written plea agreement with the Commonwealth's Attorney, whereby Cruse would

have avoided a death sentence. This written plea agreement was revoked by the Commonwealth because Cruse breached the agreement by not telling the complete truth about the offenses.

4. As I have stated in a prior Affidavit dated February 7, 1996, at the time Cruse testified at the January 1994 capital murder trial of Michael Wayne Williams in Cumberland County, Cruse had no formal plea agreement with the Commonwealth.

5. At the time Cruse testified at Williams' trial, Cruse did have an understanding with the Commonwealth that if he cooperated with the Commonwealth in preparation for Williams' trial and testified against Williams, his cooperation and testimony might help him with the capital murder charges and other felony charges he was facing in Cumberland County.

/s/ _____
Donald C. Blessing

COMMONWEALTH OF VIRGINIA,

CITY/COUNTY OF _____, to-wit:

Subscribed and sworn to before me this ___ day of March 1997.

My Commission expires: _____

_____
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Petitioner,

Civil No. 3:96-CV-529

v.

J.D. NETHERLAND, Warden,
Mecklenburg Correctional Center,

Respondent.

MOTION FOR LEAVE TO INVOKE DISCOVERY

The petitioner, Michael Wayne Williams ("Williams"), by counsel, pursuant to Rule 6(a) of the Rules Governing Section 2254 Cases, respectfully moves this Court for entry of an order directing the Clerk to issue subpoenas *duces tecum* for the production of documents that are pertinent to certain factual issues raised in Williams' Petition.

Williams' Petition asserts that the Commonwealth failed to disclose that there was a plea agreement, understanding, arrangement or expectation between the Commonwealth and Jeffrey Allan Cruse, the chief prosecution witness. Petition, Claim IV.A.1, at 86. The Commonwealth admits that at one time a plea agreement existed, but denies that such an agreement existed at the time of Cruse's testimony against Williams. Respondent's Answer, at 30-31. In Williams' state habeas proceeding, a motion for discovery relating to this issue was summarily denied. Williams therefore has not had the opportunity to discover documents in the files of the Commonwealth's

representatives who were responsible for prosecuting the criminal charges against Cruse and Williams or documents in the files of Cruse's defense counsel which are relevant to this issue.

Rule 6(a) vests this Court with discretion to authorize discovery in habeas cases "for good cause shown". Federal courts considering discovery motions in habeas cases have applied the standard established in *Harris v. Nelson*, 394 U.S. 286 (1969), even though *Harris* predates enactment of Rule 6, governing discovery in habeas cases. *See, e.g., Gilday v. Callahan*, 99 F.R.D. (D. Mass. 1983) (citing *Harris* as the standard for considering discovery motions in habeas cases).

Harris articulates the standard for establishing "good cause" to support discovery in habeas cases as follows:

> We do not assume that courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them. We are aware that confinement sometimes induces fantasy which has its basis in paranoia of prison rather than in fact. But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. 394 U.S. at 300.

Williams has demonstrated reason to believe that full discovery of the relevant facts could result in proof of a claim entitling him to relief. Petition, Claim IV.A.I., at 86.

The Commonwealth relies upon the affidavit of one of the Commonwealth's Attorneys involved in prosecuting the Williams and Cruse cases and the affidavit of one of Cruse's defense counsel, which affidavits assert in summary fashion the absence of any agreement between Cruse and the Commonwealth. The affidavits do not address the possible existence of promises, inducements, expectations or understandings which may have affected Cruse's testimony. Nevertheless, the record clearly suggests the existence of inducements or understandings between the Commonwealth and Cruse regarding Cruse's sentence for the Keller murders. *Id.* Williams has therefore shown a reasonable basis to believe that full discovery of this issue could result in his proof of a claim entitling him to relief.

For these reasons, Williams respectfully requests that this Court enter an order permitting discovery of the relevant documentary evidence by means of subpoenas *duces tecum* as set forth specifically in the Statement of Documents to be Produced.

MICHAEL WAYNE WILLIAMS

By: /s/ Illegible
Counsel

Barbara L. Hartung, VSB #38062
1001 East Main Street, Suite 410
Richmond, Virginia 23219
(804) 649-1088

James E. Moore, VSB #14526
Theodore Adams, III, VSB #26708
Hill B. Wellford, III, VSB #38938
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
(804) 697-4127

Virginia Capital Representation
Resource Center
1001 East Main Street, 5th Floor
Post Office Box 506
Richmond, Virginia 23204-0506
(804) 643-6845

April 29, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL WAYNE
WILLIAMS,

Petitioner,

v.

Civil No. 3:96-CV-529

J.D. NETHERLAND,
Warden, Mecklenburg
Correctional Center,

Respondent.

STATEMENT OF DOCUMENTS TO BE PRODUCED

1. All documents, audio tapes, video tapes, or recordings, of any description, reflecting or relating to any agreement, understanding, promise, inducement, expectation, consideration, benefit, or payment offered to or for the benefit of Jeffrey Alan Cruse in connection with the investigation, trial or post-conviction proceedings against Michael Wayne Williams or Cruse relating to the deaths of Morris C. Keller and Mary Elizabeth Keller.

2. All documents, audio tapes video tapes, or recordings, of any description, reflecting or relating to communications between representatives of the Commonwealth of Virginia and Jeffrey Alan Cruse or communications between representatives of the Commonwealth and any of Cruse's lawyers, in connection with the investigation, trial or post-conviction proceedings against Cruse or Michael Wayne Williams relating to the deaths of Morris C. Keller and Mary Elizabeth Keller.

3. Any oral statements, whether or not reduced to writing, reflecting or relating to any agreement, understanding, promise, inducement, expectation, consideration, benefit, or payment by the Commonwealth of Virginia offered to or for the benefit of Jeffrey Alan Cruse in connection with the investigation, trial or post-conviction proceedings against Michael Wayne Williams or Cruse relating to the deaths of Morris C. Keller and Mary Elizabeth Keller.

MICHAEL WAYNE WILLIAMS

By: /s/ Illegible
Counsel

Barbara L. Hartung, VSB #38062
1001 East Main Street, Suite 410
Richmond, Virginia 23219
(804) 649-1088

James E. Moore, VSB #14526
Theodore Adams, III, VSB #26708
Hill B. Wellford, III, VSB #38938
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
(804) 697-4127

Virginia Capital Representation
Resource Center
1001 East Main Street, 5th Floor
Post Office Box 506
Richmond, Virginia 23204-0506
(804) 643-6845

April 29, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL WAYNE
WILLIAMS,

Petitioner,

v. Civil No. 3:96-CV-529

J.D. NETHERLAND,
Warden, Mecklenburg
Correctional Center,

Respondent.

REQUEST FOR SUBPOENAS DUCES TECUM

Pursuant to Petitioner's Motion for Leave to Invoke Discovery and the attached Statement of Documents to be Produced, the petitioner hereby requests that the Court direct the Clerk to issue subpoenas *duces tecum* to each of the persons listed below, requiring that such persons produce all documents described in the Statement of Documents to be Produced within 14 days of service, at the offices of James E. Moore, Esquire. Christian & Barton, L.L.P., 909 East Main Street, Suite 1200, Richmond, Virginia 23219.

The following persons may have custody of documents responsive to petitioner's discovery request:

Donald C. Blessing, Esquire
215 North Main Street
Farmville, Virginia 23901

Lee R. Harrison, Esquire
2309 Cartersville Road
Cartersville, Virginia 23027

Warren B. Von Schuch, Esquire
Assistant Commonwealth's Attorney
Office of the Commonwealth's Attorney
Chesterfield County
9500 Courthouse Road
Chesterfield, Virginia 23832

Patricia D. Scales, Esquire
Commonwealth's Attorney
Cumberland County
Route 60
Cumberland Courthouse Circle
Cumberland, Virginia 23040

James R. Ennis, Esquire
Commonwealth's Attorney
Prince Edward County
One Mill Street
Farmville, Virginia 23901

Gene A. Southall
Sheriff – Prince Edward County
North Main Street
Post Office Box 25
Farmville, Virginia 23901

Claude Meinhard
Sheriff – Cumberland County
Route 60
Post Office Box 71
Cumberland, Virginia 23040

MICHAEL WAYNE WILLIAMS

By: /s/ Illegible
Counsel

Barbara L. Hartung, VSB #38062
1001 East Main Street, Suite 410
Richmond, Virginia 23219
(804) 649-1088

James E. Moore, VSB #14526
Theodore Adams, III, VSB #26708
Hill B. Wellford, III, VSB #38938
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
(804) 697-4127

Virginia Capital Representation
Resource Center
1001 East Main Street, 5th Floor
Post Office Box 506
Richmond, Virginia 23204-0506
(804) 643-6845

April 29, 1997

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

MICHAEL WAYNE WILLIAMS,

Petitioner,

v. Civil Action No. 3:96CV529

J.D. NETHERLAND, WARDEN,

Respondent.

PETITIONER'S REPLY TO OPPOSITION
TO MOTION FOR LEAVE TO INVOKE DISCOVERY

Petitioner, Michael Wayne Williams, by counsel, submits this reply in support of his motion for leave to invoke discovery, and says:

1. Petitioner, pursuant to Rule 6(a) of the Rules Governing Section 2254 Cases, has sought leave to invoke discovery regarding Claim IV(A)(1). In that claim,[1] petitioner alleged, in part, that the Commonwealth failed to reveal its agreement and/or understanding concerning sentence with the cooperating co-defendant, Jeffrey Cruse. Cruse testified at Williams' trial that Cruse had fired one fatal shot at Mrs. Keller and Williams had fired the remaining five shots at Mr. and Mrs. Keller. Although

[1] Respondent concedes that the claim concerning failure to reveal an agreement with Cruse is not defaulted. Oppos. at 3, para. 5. Petitioner has previously addressed respondent's arguments concerning default of other aspects of the claim, Response to Motion to Dismiss filed 2/3/97, and relies on those arguments here. However, the issue need not be resolved at this time.

Cruse testified under oath to facts constituting capital murder, he maintained that he had no agreement, promise, or understanding with the Commonwealth concerning his sentence.

2. During state habeas proceedings, Williams sought discovery on this claim with no success. State habeas counsel Eric White wrote both the Commonwealth's Attorney who tried the case and Respondent's counsel on October 30, 1995, and specifically requested information on consideration or promises of consideration given to any witness, including Cruse. Attachment A at p. 3, para. 4, and at p. 4 (last paragraph). Mr. White also requested permission to review the investigative files of the Cumberland County Sheriff's Office and the Prince Edward County Sheriff's Office[2]. Attachments B1 and B2. On November 1, 1995, Respondent's counsel answered Mr. White and stated that he would not review the Commonwealth's materials for exculpatory or impeachment material as requested. "I know of no authority that requires the Commonwealth, as the respondent in a civil habeas proceeding, to comply with such a request from petitioner's counsel." Attachment C at 1, para. 3.

[2] The Prince Edward files are relevant because Cruse's testimony connected a gun used in the Cumberland County murders to that used in the Prince Edward murders. Thus, Cruse assisted the Prince Edward prosecution against Williams and may have been promised support or consideration at the time of his sentencing in return. In fact, prior to Cruse's sentencing the Prince Edward Commonwealth's Attorney offered his assistance to Cruse's attorney. See Attachment G. Evidence of the Prince Edward murders was admitted at the sentencing phase of Williams' Cumberland County trial.

3. On December 1, 1995, Mr. White wrote to Respondent's counsel and advised that he wished to speak with Mr. Cruse. However, Mr. Cruse was incarcerated in protective custody at an unknown location. Mr. White asked Respondent to disclose Mr. Cruse's location so Mr. White could interview him. Attachment D. By letter dated December 11, 1995, Respondent refused to do so.[3] Attachment E. On January 10, 1996, Mr. White filed a motion with the Virginia Supreme Court seeking production of Mr. Cruse "at a location to be chosen by the Commonwealth." In that motion, Mr. White stated:

> The files of trial counsel as well as the record in this case do not adequately reflect information or discovery relating to plea agreements between the Commonwealth and Jeffrey Alan Cruse. Accordingly, counsel must talk to Mr. Cruse and obtain records relating to his incarceration.

Respondent's Attachment 5 at para. 7. Mr. White sought production of all "documentation relating to the incarceration of Jeffrey Cruse since his first incarceration on charges of capital murder in Cumberland County." *Id.* On January 16, 1996, Respondent filed his Opposition to the discovery motion which he described as seeking information from Cruse about "the possible existence of plea agreements" as well as documentation relating to Cruse's incarceration for the Keller murders. Attachment F at para. 2. Respondent argued that Williams had no right to discovery in state habeas. Williams' motions were denied

---

[3] Respondent continues to conceal Cruse's location despite the fact that Williams is incarcerated at Mecklenburg on death row and not a threat to Cruse.

by the Virginia Supreme Court on the same date his state habeas petition was dismissed.[4]

4. Obviously Williams sought a variety of evidence in support of his *Brady* claim in state habeas, as well as a hearing, but was denied access to the relevant information and parties. As Williams was not granted a hearing on the issue, he had no opportunity for court ordered prehearing discovery and no opportunity to present and develop his claim at a hearing. Thus, Respondent's argument that Williams failed to pursue relevant facts in state collateral proceedings is not supported by the facts or by the cases relied upon by Respondent. *See opposition* at 5, 8. Respondent relies on cases where the petitioner had been provided a hearing at the state level or where the petitioner had failed to seek the relevant information. Such is not the case here. Contrary to respondent's assertions, Williams is not bound by the prior state record where he had no opportunity to develop his claim. Without court ordered discovery, Williams was simply unable to obtain the evidence required to prove this claim. The Commonwealth has opposed all his prior efforts and continues to do so here. The existence of the Commonwealth's "deal" with Cruse has been an issue at trial, in state habeas, and now in this proceeding. His Rule 6 motion should be granted.

5. Williams request is not premature. The evidence he seeks will assist this Court when determining whether

---

[4] Current counsel is unaware of any capital case in which the Virginia Supreme Court has granted discovery, a hearing, or expert assistance since obtaining exclusive jurisdiction of capital state habeas petitions on July 1, 1995.

a hearing should be granted on the issue. Such a procedure has the approval of the United States Supreme Court. *See Blackledge v. Allison*, 431 U.S. 63, 81 (1977) (approving Rule 6 discovery prior to the grant to a hearing to determine whether a factual basis for claim exists); *Herrera v. Collins*, 113 S. Ct. 853, 883 (1993) (Blackmun, J., dissenting on other grounds) (discovery warranted "when[ever] it would help the court make a reliable determination with respect to the petitioner's claim."). Discovery is clearly appropriate here. A reading of the trial record, as set forth in Williams' Claim IV(A)(1), common sense and some minimal experience in criminal prosecutions, supports the conclusion that Cruse had an understanding or agreement with the Commonwealth regarding his testimony and sentence.

6. Nor must Williams meet the two part test under Section 2254(e), as Respondent argues (Oppos. at 7-8), for that test applies only where the petitioner has been provided with the opportunity to develop the relevant facts in a state court proceedings. *See Love v. Morton*, ___ F.3d ___, 1997 WL 220329 at *5 (3d Cir. May 5, 1997). No such opportunity was provided to Williams. Moreover, when arguing that 2254(e) applies, Respondent misstates Williams' testimony. Respondent states that Williams "admitted under oath that he fired the first shot that killed Mr. Keller." Oppos. at 8, para. 15. However, Williams testified that he fired one shot at Mr. Keller and after that shot Mr. Keller stood up. According to Williams, Cruse fired all the remaining shots at Mr. and Mrs. Keller. Tr. 176-77 (1-5-94). As set forth in Williams' petition and as argued at trial, the first shot to Mr. Keller was not fatal, and Williams never testified that he fired a fatal shot.

7. Without discovery, Williams has been unable to match Respondent's resources in his efforts to develop this claim. It cannot be expected that the Commonwealth would voluntarily produce critical, relevant documents or that witnesses voluntarily would admit misconduct upon mere inquiry by Williams' counsel. Only court ordered discovery can begin to provide a level playing field in the development of this claim.

8. Thus, Williams has demonstrated good cause as required under Rule 6 and his request is timely. For the reasons set forth in his original motion and herein, his motion for discovery should be granted.

Respectfully submitted,

MICHAEL WAYNE WILLIAMS

By: /s/ Barbara L. Hartung

Barbara L. Hartung, VSB #38062
1001 East Main Street, Suite 410
Richmond, VA 23219
(804) 649-1088

James E. Moore, VSB #14526
Theodore Adams, III, VSB #26708
Hill B. Wellford, III, VSB #38938
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
Richmond, VA 23219-3095
(804) 697-4127

Virginia Capital Representation
Resource Center
1001 East Main Street, 5th
P.O. Box 506
Richmond, VA 23204-0506
(804) 643-6845

May 14, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,	)	
Petitioner,	)	Civil Action No. 3:96cv529
v.	)	
J.D. NETHERLAND, Warden,	)	
Respondent.	)	

ORDER

(Filed Jul. 16, 1997)

This matter is before the Court on petitioner's motion for subpoenas *duces tecum* for the production of documents concerning Claim IV.A.1 of his petition for habeas corpus. The Court finds that petitioner has not demonstrated good cause for this discovery request. Accordingly, deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED that petitioner's motion is DENIED.

Let the Clerk send copies of this Order to Counsel of record.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

July 16, 1997
DATE

RECEIVED
AUG 0 5 1997
Virginia Interstate
Corrections Compact

055

Mr. Jeffery A. Cru-
~~Powhatan Reception~~
~~State Farm, Virginia~~

Please forward to
ACI-West.

inmate!
Thanks,
Bobby Kyles

July 29, 1997

Mr. Jeffrey A. Cruse #215584
Powhatan Reception & Classification Center
State Farm, Virginia 23160

Dear Mr. Cruse:

I am a mitigation investigator who is assigned to work on the Michael Williams case. I would like to talk about his case with you. I was told that at the onset of this capital case you believed Mr. Williams had threaten [sic] your life. I have talked with Mr. Williams on several occasions concerning this, and have directly asked him about these threats. He stated that he did make some statements. At that time he was just angry, he didn't mean them. Mr. Williams has assured me that he has no intentions or desires to cause you any harm now or ever.

There are some areas in his case that I would like to talk to you about.

If you have any questions, call me collect at 804-643-6845, if for some reason I am not in my office, please leave me a message on my voice mail. I will be waiting to hear from you.

Thank you,
/s/ Alfred C. Brown
Alfred C. Brown

[Address Omitted In Printing]

[Business Card Enclosed In Letter]

[LOGO]
Alfred C. Brown
Chief Mitigation Specialist

Virginia Capital Representation Resource Center
The Heritage Building
1001 East Main Street, P.O. Box 506,
Richmond, Virginia 23204-0506

(804) 643-0197
FAX: (804) 643-6819

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

Civil Action
No. 3:96CV529

J.D. NETHERLAND, Warden,

Respondent.

SECOND MOTION FOR
LEAVE TO INVOKE DISCOVERY

(Filed Jul. 31, 1997)

The petitioner, Michael Wayne Williams ("Williams"), by counsel pursuant to Rule 6(a) of the Rules Governing Section 2254 Cases, respectfully moves this Court for an Order directing Respondent to disclose to counsel for Williams the present location of Jeffrey Allan Cruse and history of his incarceration. Cruse was a participant in the capital murders of the Kellers, for which Williams was convicted and sentenced to death, and he testified for the Commonwealth at Williams' trial.

Cruse was convicted and sentenced for his part in the Keller murders and is incarcerated at an unknown location out of state. During state habeas proceedings, counsel for Williams moved the Virginia Supreme Court for disclosure of Cruse's location or, in the alternative, for the production of Cruse at a location selected by the Commonwealth so counsel could interview Cruse, and

for records of his incarceration. Attachment A. Respondent opposed the motion. The motion was denied by the Virginia Supreme Court. Attachment B. During the preparation of Williams' federal petition, additional, unsuccessful efforts were made to determine where Cruse was incarcerated. The information requested is essential to the full development and presentation of Williams' claims to this Court.

In Claim II(A) of his federal petition Williams asserted that the evidence was insufficient to establish his guilt because he and Cruse had given conflicting testimony as to who fired multiple fatal shots at Mr. and Mrs. Keller. Both Williams and Cruse each admitted firing one shot. Cruse admitted shooting Mrs. Keller once in the head. Williams contended that he fired a single shot at Mr. Keller, who fell to the ground but then stood up, and that this shot was not fatal. Respondent credits Cruse's testimony that Williams then fired additional shots that killed the Kellers. Resp. Motion to Dismiss at 22-23. No independent evidence corroborated Cruse's account.

Williams also asserted in Claim IV(A)(2) that the Commonwealth failed to disclose *Brady* material contained in a psychiatric report on Cruse. In September 1993, while incarcerated for the Keller murders prior to Williams' trial, Cruse was evaluated by a psychiatrist affiliated with the Goochland-Powhatan Community Services Board. A report of that interview states "[Cruse] has little recollection of [the Keller murders], other than vague memories, as he was intoxicated with alcohol and marijuana at the time. He reports having done LSD two months prior in large amounts, 'up to 12 hits at a time', and had been doing so for the past 10 months prior to

that." Attachment C. In contrast, at Williams' trial in January 1994, Cruse testified in great detail about the events leading up to the murder of the Kellers and about the shooting of Mr. and Mrs. Keller. Cruse's intoxication and his admitted inability to remember facts surrounding the Keller murders, as revealed in the September report, were obviously *Brady* material that should have been disclosed to Williams' trial counsel. *Kyles v. Whitley*, 115 S. Ct. 1555 (1995), *United States v. Bagley*, 473 U.S. 667 (1985). Respondent has maintained that Cruse's testimony demonstrates Williams' guilt. Resp. Motion to Dismiss at 22-23. Given the discrepancies between Cruse's trial testimony and his account in September 1993, current counsel must interview Cruse about the Keller murders, his trial testimony, and his recollections. Cruse has been convicted and sentenced for his part in the Keller murders, and no longer has a motive to minimize his part in the shootings.

Furthermore, in view of the September 1993 report, it is highly probable that additional interviews were conducted of Cruse both before and after Williams' capital trial that have not yet been disclosed to Williams' counsel. Those interviews may contain further accounts by Cruse that contradict or impeach the testimony he gave at Williams' trial. As Williams' counsel have been unable to determine where Cruse has been incarcerated, counsel cannot specify the probable location and custodians of the relevant documents for the Court. Therefore, counsel also moves this Court for an Order pursuant to Rule 6 (a) directing Respondent to disclose to Williams' counsel each institution where Cruse was incarcerated, along

with the relevant dates, from the date of Cruse's arrest on the Keller homicides up to the present.

Rule 6(a) vests this Court with discretion to authorize discovery in habeas cases "for good cause shown." Federal courts considering discovery motions in habeas cases have applied the standard established in *Harris v. Nelson*, 394 U.S. 286 (1989), even though Harris predates enactment of Rule 6, governing discovery in habeas cases. *See, e.g., Gilday v. Callahan*, 99 F.R.D. (D.Mass. 1983) (citing *Harris* as the standard for considering discovery motions in habeas cases).

Harris articulates the standard for establishing "good cause" to support discovery in habeas cases as follows:

> [W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. 394 U.S. at 300. The Supreme Court reaffirmed *Harris* just this term in *Bracy v. Gramley*, ___ U.S. ___, 1997 WL 303400 (June 9, 1997), and concluded that the petitioner had made a sufficient showing to permit discovery on a claim of judicial bias. Thus in *Bracy*, the petitioner was granted the means to develop new evidence in support of his claim in federal court. Williams seeks to do the same here. In addition, discovery is available upon a showing of good cause "regardless of whether there is to be an evidentiary hearing." *Jones v. Wood*, ___F.3d___, 1997 WL 312584, (9th Cir. June 12, 1997).

Williams has demonstrated reason to believe that full discovery of the relevant facts may support his *Brady* claim and demonstrate that he is entitled to relief. Cruse's testimony was essential to Williams' conviction, and any suppression of *Brady* material relevant to Cruse's testimony would be highly prejudicial and grounds for relief. Further discovery and investigation may establish Williams' innocence of one or more of his capital convictions.

For these reasons, Williams respectfully requests that this Court enter an Order granting Williams discovery of Cruse's current location and granting discovery of each prior place of incarceration, along with the relevant dates, from the date of Cruse's arrest on the Keller homicides up to the present.

MICHAEL WAYNE WILLIAMS
By: /s/ Barbara L. Hartung
Counsel

Barbara L. Hartung, VSB 38062
1001 East Main Street, Suite 504
Richmond, VA 23219
(804) 649-1088

James E. Moore, VSB 14526
Theodore Adams, III, VSB 26708
Hill B. Wellford, III, VSB 38938
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
(804) 697-4127

Virginia Capital Representation
Resource Center
1001 East Main Street
P.O. Box 506
Richmond, VA 23204-0506
(804) 643-6845

July 31, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS, Petitioner,	)	Civil Action No. 3:96CV529
v.	)	
J.D. NETHERLAND, WARDEN, Respondent.	)	

ORDER

For the reasons stated in the Memorandum of the Court this day filed and deeming it proper so to do, it is ADJUDGED AND ORDERED that all claims asserted in the Petition, except Claims I(A), IV(A)(1), and IV(A)(5) be and the same are hereby **DISMISSED**.

An evidentiary hearing on Claims I(A), IV(A)(1) and IV(A)(5) will be conducted commencing at **8:30 a.m. Monday, May 18, 1998**.

Counsel for each of the parties herein shall, by **1:00 p.m., May 13, 1998**, file with the Clerk of this Court proposed findings of fact and conclusions of law.

Let the Clerk send copies of the Memorandum and this Order to all counsel of record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date APR 13 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Caption Omitted In Printing]

Civil Action No. 3:96CV529

MEMORANDUM OPINION

This matter is before the Court on the motion of Respondent J.D. Netherland, Warden of Mecklenberg Prison, to dismiss Petitioner Michael Wayne Williams' petition for a writ of habeas corpus for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The matter has been fully briefed by the parties and is ripe for decision. For the reasons which follow, the Court will GRANT IN PART AND DENY IN PART the motion.

I. FACTUAL BACKGROUND

In affirming Williams' conviction and sentence on direct appeal, the Virginia Supreme Court stated the facts of the case as follows:

> Between 9:30 and 10:30 p.m., on Saturday, February 27, 1993, Verena Lozano James drove Williams and Cruse to a rural area in Cumberland County and left them approximately one-half mile from Bear Creek Market. Williams and Cruse planned to rob persons in the market with a .357 caliber Ruger Black Hawk revolver that Williams had given to Cruse.
>
> The two men walked to the store, but found it closed. Williams suggested that "he knew a house where we can go; they'd have a couple thousand dollars." Cruse agreed, and they

walked some distance to the Kellers' house. Upon arrival at the Kellers' house, Cruse returned the Black Hawk revolver to Williams and Cruse knocked on the door. When Mr. Keller opened the door, Williams pointed the gun at him and both men entered the house.

Williams ordered the Kellers to remove all their clothes, and he remained in the kitchen with them while Cruse began searching the house for money and other valuables. After Cruse found a fully loaded .38 caliber handgun, Williams decided "to tie [the Kellers] up," and Cruse did so. The Kellers were then placed, first in one closet and later in separate closets, and both men resumed their search.

After the two men had assembled some of the Kellers' property in the living room, at Williams's suggestion, first Williams, then Cruse, raped Mrs. Keller. Afterward, Williams ordered both Kellers to take showers and put on clean clothes, which they did. Williams then directed the Kellers to "take a walk" with them. Upon hearing that the two men planned to burn the house, Mrs. Keller took the Kellers' marriage certificate with her. As the Kellers, Williams, and Cruse left the house and walked "[d]own on a dirt road and into a thicket," Williams was carrying the .38 caliber handgun and Cruse was carrying the Black Hawk revolver.

When they were in the thicket with Williams standing behind Mr. Keller and Cruse standing behind Mrs. Keller, Williams said, "We'll shoot at the count of three." Upon Williams's count of three, he shot Mr. Keller with the .38 caliber handgun and Mr. Keller fell to the

ground. However, Cruse did not shoot Mrs. Keller. Williams told Cruse to shoot Mrs. Keller because "he didn't want to leave no witnesses." Cruse then shot Mrs. Keller once with the Black Hawk revolver. After Mrs. Keller fell, Mr. Keller stood up and Williams shot him again with the .38 caliber handgun. As Cruse started to walk away, Williams said, "Wait . . . [w]hat if they ain't dead?", and he shot each of the Kellers "a couple more times apiece" with the .38 caliber handgun.

The two men returned to the house, where they loaded a television set, microwave oven, shotgun, stereo set, and speakers into Mr. Keller's jeep, and, at Williams's suggestion, set fire to the house. Williams and Cruse then took the jeep to Fredericksburg, where they sold some of the stolen property the next day. They then threw the remaining stolen property and the Black Hawk revolver into the Rappahannock River and set fire to the jeep.

Upon hearing of the Keller fire on Monday morning, Verena James advised the police that she had taken Williams and Cruse to an area not far from the Keller house on the night of the fire. Consequently, the police sought to question the two men regarding the fire. Williams and Cruse had returned to Cumberland County the Monday following the murders and the police were able to question Cruse. Williams, however, fled to Florida.

At first, Cruse furnished no information of value to the police. However, after the police discovered the bodies of the Kellers on Tuesday, Cruse consulted counsel. His counsel obtained a conditional agreement from the Commonwealth

that it would not seek the death penalty provided Cruse gave a truthful statement of his knowledge of the crimes. Cruse then furnished information that implicated both men in all of the crimes charged, except for Cruse's role in Mrs. Keller's rape. Because Cruse breached his agreement in failing to tell the police that he had raped Mrs. Keller, the Commonwealth also indicted him for the Kellers' capital murders.

Testifying in his own defense, Williams agreed with Cruse: (1) that Williams was the one who suggested robbing persons at the store; (2) that Williams was the first one to shoot Mr. Keller and that Cruse was the first one to shoot Mrs. Keller; and (3) that it was Williams's idea to burn the Keller house. However, Williams (1) denied that he raped Mrs. Keller, (2) claimed that Cruse fired all the subsequent shots into the Kellers' bodies, and (3) contradicted other details of Cruse's testimony about who had suggested some of their activities during and after the murders.

Lisa C. Schiermeier, a serologist, tested the seminal fluid recovered from Mrs. Keller's vagina as a part of the Physical Evidence Recovery Kit prepared by Dr. Deborah Kay, an assistant chief medical examiner who performed the autopsy on Mrs. Keller. Schiermeier compared that sample with the blood types of Cruse, Williams, and Mr. Keller. Schiermeier testified that her comparison indicated only Williams could have contributed a certain type of seminal fluid found in the sample. Dr. George C. Li, a DNA expert who performed a DNA test on the spermatozoa from the sample, testified that his test results were consistent with a conclusion that

Cruse and Williams jointly contributed the seminal fluid.

Williams v. Commonwealth, 248 Va. 528, 533-35 (Va. 1994).

II. PROCEDURAL HISTORY

On June 29, 1993, in the Circuit Court of Cumberland County, Virginia, Michael Wayne Williams ("Williams") was charged in twelve separate indictments for the capital murder, robbery, rape, and abduction of Mary Keller; for the capital murder, robbery, and abduction of Morris Keller; for capital murder based on two related homicides; for statutory burglary; and for arson. Jeffrey Allan Cruse ("Cruse") was also indicted for the same offenses. Several months earlier, Williams was arrested and indicted on four homicides which had occurred in Prince Edward County on December 24, 1992. Williams pled not guilty to each of the charges.

Williams was subsequently tried by a jury which found him guilty on all counts. On the non-capital charges, the jury fixed Williams' punishment at life imprisonment for the rape, 50 years and a $100,000 fine for the arson, 40 years for each of the robberies, 20 years for the burglary, and 10 years for each of the abductions. On January 7, 1994, the jury recommended that Williams be sentenced to death for the capital murders of both Mr. and Mrs. Keller, finding that both statutory aggravators of "future dangerousness" and "vileness" existed. The trial judge subsequently adopted the jury's recommendation and sentenced Williams to death on February 22, 1994.

On November 4, 1994, the Virginia Supreme Court upheld Williams' capital murder convictions and death sentences in *Williams v. Commonwealth*, 248 Va. 528 (1994). Williams' request for a rehearing was denied on January 13, 1995. On June 26, 1995, the U.S. Supreme Court denied his petition for a writ of certiorari. *See Williams v. Virginia*, 113 S. Ct. 1880 (1995). Williams subsequently filed a petition for a writ of habeas corpus in state post-conviction proceedings.

On August 30, 1995, Williams filed his initial state habeas petition. From December 1995 to January 1996, counsel for Williams also filed motions for expert assistance and discovery. On January 29, 1996, after receiving leave to amend, Williams filed an amended state habeas petition. The Virginia Supreme Court dismissed Williams' petition without hearing or oral argument and denied all motions for expert services and discovery on March 18, 1996. The U.S. Supreme Court again denied certiorari on October 7, 1996. *See Williams v. Netherland*, 117 S. Ct. 200 (1996).

On July 2, 1996, this Court granted Williams' motion for appointment of counsel and stay of execution, then scheduled for July 11, 1996. By Order entered on August 13, 1996, this Court directed Williams to file his federal habeas petition within 180 days of April 24, 1996. The Court subsequently granted Williams' request for a 30-day extension. Williams filed his federal habeas petition on November 20, 1996.

III. CLAIMS PRESENTED

In his federal habeas petition Williams attacks his conviction and sentence on the following grounds:

I. Juror Misconduct Violated Williams' Rights to an Impartial Jury and to Due Process of Law

   A. Juror Stinnett

   B. Juror Blanton

   C. The Jurors Improperly Considered Parole Eligibility During the Sentencing Deliberations

II. The Evidence Was Insufficient as a Matter of Law to Sustain Any Convictions for Capital Murder

   A. The Evidence Did Not Establish that Williams Was the Triggerman

   B. The Predicate Felonies Were Not Part of the Murders

III. The Trial Court Denied Williams a Fair Trial and Sentencing

   A. Guilt Phase

      1. The Trial Court Gave an Erroneous Instruction on Capital Murder and Relieved the Commonwealth of Its Burden to Prove the Elements of Capital Murder

      2. The Trial Court Did Not Properly Perform or Permit a "Life-Qualification" of the Jury

         a. Jurors Trent and Holman

b. Juror Bernard

c. Juror Davis

d. Jury Predisposed to Impose Death

3. The Trial Court Erred When It Refused to Permit In-Depth, Individual Questioning Regarding Pre-Trial Publicity

4. The Trial Court Denied Williams a Fair Trial By Refusing His Request For Appointment of an Investigator

5. A Mistrial Should Have Been Declared After Verena James Referred to the "Rice Fires" During the Guilt Phase of Trial

6. The Trial Court Erred in Allowing the Commonwealth's Attorney to Improperly Bolster the Testimony of Cruse

7. The Trial Court Erred in Admitting Into Evidence Numerous Photographs of the Victims

8. Williams' Constitutional Right to be Present at Trial and to Confront His Witnesses Should Not Have Been the Subject of Impeachmen [sic]

B. Sentencing Phase

1. The Trial Court Erred in Not Declaring a Mistrial or Not Giving Cautionary Instructions After

Improper and Inflammatory Closing Argument by the Commonwealth at the Sentencing Phase

2. Williams Was Not Provided With Appropriate Discovery to Rebut the Commonwealth's Case on Vileness and Future Dangerousness

3. The Court Erred in Denying a Jury Instruction Concerning the Meaning Life Sentence and Williams' Mandatory 30 Year Parole Ineligibility

4. The Trial Court Erred in Permitting the Mother of the Victim to Testify at the Sentencing Phase

5. The Trial Court Erred When Admitting Evidence of Unadjudicated Criminal Acts in the Sentencing Phase of the Trial

6. The Trial Court Erred in Admitting Evidence of Unadjudicated Criminal Conduct Without Setting a Standard of Proof

7. The Trial Court Erred in Admitting Photographs of the Prince Edward Homicides

8. The Trial Court Erred in Permitting Cross-Examination of Williams' Mother That Exceeded the Scope of Direct Examination

9. The Trial Court Erred in Restricting the Testimony of Williams' Mitigation Expert and Barring

Testimony Explicitly Permitted Under the Statute

10. The Trial Court Erred With Instructing the Jury at the Sentencing Phase and in Failing to Instruct on Mitigation and Mitigating Evidence

11. The Trial Court's Sentencing Instructions Were Constitutionally Deficient

IV. Prosecutorial Misconduct Deprived Williams of a Fair Trial and Due Process

A. Guilt Phase

1. The Commonwealth Failed to Disclose Its Agreement With the Chief Prosecution Witness, Cruse, and Actively Misled the Jury Regarding An Agreement With Cruse

2. The Commonwealth Failed to Disclose a Psychiatric Evaluation of Cruse Containing Brady Information

3. The Commonwealth Allowed Cruse, Williams' Co-Defendant, to Misrepresent his Cooperation and Contacts With the Commonwealth Prior to Williams' Trial

4. The Commonwealth Presented Improper Opening and Closing Arguments

5. The Commonwealth Failed to Reveal at Voir Dire That Stinnett's

Former Husband Would be a Trial Witness and That She Had Failed To Reveal Their Relationship to the Court and Counsel

B. Sentencing Phase

1. The Prosecutor Acting Improperly When Objecting to Dr. Cornell's Testimony About Mitigation Factors Properly Before the Jury

2. The Prosecutor Engaged in Improper and Prejudicial Argument During the Sentencing Phase

V. Williams Did Not Receive Effective Assistance of Counsel

A. Guilt Phase

1. Counsel was Ineffective in Failing to Object to Improper Instructions Regarding the Triggerman Rule and the Degrees of Murder

2. Counsel Did Not Effectively Investigate or Confront the Petitioner's Co-Defendant, Jeffrey Alan Cruse, or the Issue of Cruse's Plea Agreement With the Commonwealth

3. Trial Counsel Failed to Investigate, Develop and Present Evidence of Voluntary Intoxication as a Defense and to Impeach the Prosecution's Key Witness

a. Intoxication as a Defense

b. Intoxication to Impeach the Prosecution's Key Witness

4. Counsel was Ineffective in Failing to Object to the Court's Deficient Preliminary Instruction and Jury Charge on the Burden of Proof

5. Petitioner's Counsel Were Ineffective on Voir Dire and Compounded The Trial Court's Error

   a. Counsel Failed to Adequately Protect Williams' Right to Life Qualification Questions

      i. Juror Trent

      ii. Juror Holman

      iii. Juror Bernard

   b. Counsel Failed to Challenge Prospective Juror Stinnett for Cause

   c. Counsel Failed to Conduct Extensive Voir Dire on the Issue of Pretrial Publicity

6. Trial Counsel Were Ineffective in Seeking Court Appointment of an Investigator

7. Counsel was Ineffective in Failing to Promptly Stipulate to the Testimony of Family Members Regarding Identification and Ownership of Property Stolen From the victims

8. Counsel Failed to Protect Williams' Rights When Counsel

Failed to Offer When a Single Objection to Improper Prosecutorial Comments

9. Counsel was Ineffective in Failing to object to Numerous Improper and Misleading Statements by the Commonwealth in opening and Closing Arguments During the Guilt/Innocence Phase of the Trial

B. Sentencing Phase

   1. Counsel Failed to Object to Testimony From the Victim's Mother

   2. Counsel Failed to Make a Timely Objection to Photographs of the Prince Edward Victims and to Properly Argue the Objection

   3. Counsel Failed to Develop Defense Evidence and Mitigation Evidence Through the Medical Examiner

   4. Counsel Failed to Develop Defense Evidence and Mitigation Through Williams' Brother

   5. Counsel Failed to Object to Cross Examination on Williams' Arrest at the Penalty Phase

   6. Counsel Failed to Present Evidence of Intoxication and Drug Use

   7. Counsel Failed to Protect the Testimony of Their Expert Witness During Objections and Interruptions by the Prosecutor and Court

8. Counsel Failed to Request an Evaluation by a Neuropsychologist

9. Counsel Failed to Present Williams' Testimony at the Sentencing Phase

10. Counsel Failed to object to a Deficient Instruction on Mitigation and Failed to Request a Corrective Mitigation Instruction

11. Counsel Failed to Object to Improper, Inflammatory and Prejudicial Argument and Failed to Request a Curative Instruction

12. Counsel Present Ineffective Argument at the Penalty Phase

C. Ineffective Assistance on Appeal

1. Failure to Appeal Denied Jury Instructions

2. Counsel Failed to Properly Appeal the Trial Court's Erroneous Restriction of Voir Dire and Violations of Witherspoon-Witt

3. Counsel Failed to Appeal the Trial Court's Failure to Remove Gary Davis in the Same Manner as the Removal Was Objected to at the Trial Court Level

VI. Williams Was Not Provided With the Effective Assistance of a Mental Health Expert Guaranteed Under *Ake v. Oklahoma*, 470 U.S. 68 (1985)

VII. Additional Constitutional Errors

A. Virginia's Death Penalty Statutes Are Unconstitutional as They Fail to Provide Guidance on the Meaning and Use of Mitigating Evidence

B. Virginia's Death Penalty Statutes Are Unconstitutionally Vague as They Fail to Provide the Sentencer With Sufficient Guidance to Assure that the Death Penalty is Not Imposed in an Arbitrary and Capricious Manner

C. Virginia's "Vileness" Factor, as Applied, Unconstitutionally Denies Defendant Notice and Meaningful opportunity to be Heard

D. The "Future Dangerousness" Aggravating Factor is Unconstitutionally Vague and Inherently Misleading as it Asks Jurors to Find a Probability Beyond a Reasonable Doubt

E. Section 19.2-264.4(c), Which Allows The Sentencer to Find "Future Dangerousness" Based on Unadjudicated Criminal Conduct, Violates The Sixth, Eighth and Fourteenth Amendments

F. The "Future Dangerousness" Aggravating Factor is Inherently Unreliable and is Insufficient to Guide Jury Discretion

G. Imposition of the Death Penalty in Virginia is Arbitrary Because of the Failure of the Supreme Court of Virginia to Engage in Meaningful or Fair Appellate Review

H. Virginia's Contemporaneous Objection Rule is Unconstitutional as Applied

I. Imposition of the Death Penalty Violates the Eighth and Fourteenth Amendments Since it Constitutes Cruel and Unusual Punishment

IV. THE APPLICABILITY OF THE 1996 ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT

On April 24, 1996, before Williams filed his federal habeas petition, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (the "Act"), became effective. Title I of the Act, entitled "Habeas Corpus Reform," substantially alters the substantive law governing habeas corpus petitions. Sections 101 to 106 of the Act modify pre-existing habeas corpus procedures contained in Chapter 153 of the Judicial Code, 28 U.S.C. §§ 2241-2255. Section 107(a) of the Act enacts a new Chapter 154, 28 U.S.C. §§ 2261-2266, which applies to habeas petitions in capital cases.

This Court has previously held that the new Act did not apply because Virginia had not satisfied the "opt-in" requirements of § 107(a) and applying Chapter 153 violated retroactivity principles. *See Strickler v. Netherland* No. 3:95cv924 (E.D. Va. 1996); *Saunders v. Angelone*, No.3:95cv620 (E.D. Va. 1996). Respondent urges the Court to reconsider its prior ruling, arguing that the procedural posture of Williams' case differs significantly from that of *Strickler* and *Saunders*. In both those cases, petitioners filed their federal habeas petitions before the Act was enacted, and had entered state habeas proceedings before

the Virginia General Assembly passed their July 1995 amendments. Williams, however, filed his state habeas petition after July 1995 and then filed his federal habeas petition in November 1996 – seven months after the Act's enactment. The legal landscape governing Williams, petition has clearly changed since *Strickler* and *Saunders*.

A. Chapter 154: New Habeas Corpus Provisions

Section 107(a) of the Act, codified at Chapter 154, 28 U.S.C. §§ 2261-2266, essentially offers a system of expedited review and other "benefits" to states that qualify under either of two "opt-in" procedures: (1) the "post-conviction" procedure provided by 28 U.S.C. § 2261; or (2) the "unitary review" procedure provided by 28 U.S.C. § 2265. As this Court found in *Strickler*, the Fourth Circuit requires courts to analyze federal habeas petitions under § 107 of the Act because that section specifically states that the Act "shall apply to cases pending on or after the date of enactment of this Act." § 107(c); *see Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 503 (1996). Section 107 applies, however, only if Virginia satisfies the "opt-in" requirements. Since Virginia does not have a unitary review procedure, the Court must therefore analyze whether Virginia meets the post-conviction review procedures and thus, qualifies as an opt-in state.

1. The "Opt-In" Requirements

To qualify as an opt-in state, a state must meet all four of the following criteria:

(1) The State must establish by statute, rule of its court of last resort, or other agency authorized by state law, a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent capital defendants. *See* § 2261(b).

(2) Such mechanism must provide standards of competency for the appointment of such counsel. *See* § 2261(b).

(3) Such mechanism must affirmatively offer counsel to all state prisoners under capital sentence. *See* § 2261(c).

(4) Such mechanism must provide for an entry of a court order either appointing counsel to each capital defendant, or explaining that such an appointment was not made on the basis that a defendant was not indigent or rejected the offer of counsel with an understanding of the legal consequences. *See* § 2261(c).

2. Has Virginia Satisfied the Opt-In Requirements?

Since July 1, 1992, Virginia has required the appointment of counsel for post-conviction capital cases under Va. Code § 19.2-163.7. While the Fourth Circuit has not considered whether this appointment mechanism satisfies the requirements of Chapter 154, this Court finds that the automatic appointment of counsel for indigent defendants does meet the first opt-in criterion.

Virginia, however, still fails to reap the benefits of Chapter 154 because it has not provided a mechanism for

the compensation and payment of such counsel as required by the Act. While Virginia substantially complies with the law via the appropriations acts of the General Assembly that provide for the payment of such counsel, it has not specifically established a "mechanism" for payment as required by the Act. The Fourth Circuit recently noted that "the Virginia statutes and regulations do not specifically provide for the compensation or payment of litigation expenses of appointed counsel, as § 107 requires." *Bennett v. Angelone*, 92 F.3d 1336, 1342 n.2 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 503 (1996). This same conclusion was reached by the Court in *Satcher v. Netherland*, 944 F. Supp. 1222 (E.D. Va. 1996), *aff'd in part and rev'd in part on other grounds*, 126 F.3d 561 (4th Cir. 1997).

As the Court in *Satcher* noted, "[i]f Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance based on past performance, it could have done so." *Id.* at 1242. Congress instead chose to confer such benefits to those states that have made a formal commitment to providing a post-conviction review system which would protect capital litigants, constitutional rights. *Id.* This Court agrees with this analysis and finds that Virginia's system for compensation and payment of expenses still fails to meet the standards established by § 107.[1] Thus, Virginia does not qualify as an opt-in state because it fails to adhere to the formal

[1] The Court is aware that the amended Va. Code § 19.2-163, effective July 1998, does provide for such a compensation and payment mechanism. This amendment, however, was not in effect at the time Williams filed his federal habeas petition.

requirements of § 2261. Accordingly, Chapter 154 does not apply to Williams' federal habeas petition.

B. Chapter 153 Amendments

Chapter 153 of the Act, §§ 101-106, effects a number of procedural changes to previous habeas corpus statutes codified in Chapter 153. Of particular relevance to Williams' petition is § 104 which substantively changes the standards of review under 28 U.S.C. § 2254.[2] Furthermore, unlike Chapter 154, the Chapter 153 amendments are not made explicitly applicable to petitions pending when the Act took effect. The U.S. Supreme Court in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), recently held that the amendments do not apply to habeas corpus cases that were pending when the Act took effect, thereby resolving a split among the circuits. Applying the amendments to these pending cases, the U.S. Supreme Court held, violates principles against retroactive application of laws. *See Landgraf v. USI Film Prods.*, 114 S. Ct. 1483 (1994). The U.S. Supreme Court expressly found that "the amendments to chapter 153 [apply] only to such cases as were filed after the statute's enactment." *Lindh*, 117 S. Ct. at 2062.

---

[2] Specifically, § 104 limits the grounds on which petitions may be granted (28 U.S.C. § 2254(d)), requires greater deference to state court findings of fact (28 U.S.C. § 2254(e)(1)), limits the availability of evidentiary hearings in a habeas court (28 U.S.C. § 2254(e)(2)), and eliminates ineffectiveness or incompetence of post-conviction counsel as a ground for relief under 28 U.S.C. § 2254 (28 U.S.C. § 2254(i)).

Williams' attempts to place his federal habeas petition in this "pending" box by arguing that he filed a state habeas petition before the Act's enactment and therefore, applying the amendments to his federal habeas petition would trigger *Landgraf's* retroactive effect. Indeed, if his federal habeas petition were pending when the Act took effect, this Court could not apply the Chapter 153 amendments pursuant to *Lindh*. Williams, however, filed his federal habeas petition in November 1996. His strained argument – that the amendments would have an impermissible retroactive effect on his federal habeas petition merely because he went through state post-conviction proceedings with the assumption that he would enter federal review under the old 28 U.S.C. § 2254 – is contrary to the U.S. Supreme Court's directive in *Lindh*. Therefore, the Chapter 153 amendments enacted seven months before Williams filed his federal habeas petition will govern his claim.

V. EXHAUSTION AND PROCEDURAL DEFAULT

This Court's review of Williams' federal habeas petition is restricted to an inquiry of whether his confinement and sentence are in violation of federal constitutional or statutory law. *See* 28 U.S.C. § 2241(c)(3). Before this Court can reach the merits of any claim, however, Williams must demonstrate that he has exhausted all state court remedies. *See Rose v. Lundy*, 455 U.S. 509 (1982). This requirement is strictly enforced in the interest of giving the state courts the first opportunity to consider any alleged errors. *See id.*

A state court has not been given a full opportunity to rule on a claim unless it has been presented before the state's highest court. *See Brown v. Allen*, 344 U.S. 443 (1953). In presenting a claim to the state court, the petitioner must "fairly present" claims cognizable under federal law. *See Picard v. Connor*, 404 U.S. 270 (1971). That is, in order to exhaust a federal claim for purposes of federal habeas corpus review, a petitioner cannot simply raise the claim in state court, citing state law, even if the state claim is analytically similar to a federal claim. *See Anderson v. Harless*, 459 U.S. 4 (1982); *Duncan v. Henry*, 513 U.S. 364 (1995) (presentation of a "miscarriage of justice" claim under California law was not the same as an allegation of a violation of federal due process).

Furthermore, Williams is not entitled to-federal review of claims which are procedurally defaulted. These include claims defaulted under an independent and adequate state procedural rule, *Coleman v. Thompson*, 501 U.S. 722, 750 (1992), and claims never presented to a state court, *Gray v. Netherland*, 116 S. Ct. 2074, 2080-81 (1996). In Virginia, no writ of habeas will be granted on the basis of any legal or factual claim which the petitioner previously could have made, but did not. *See Gray*, 116 S. Ct. at 2080; *Slayton v. Parricran*, 215 Va. 27 (1974), *cert. denied*, 419 U.S. 1108 (1975). In order to overcome this procedural bar, the petitioner must demonstrate good cause for his failure to preserve the issue and prejudice resulting from the constitutional violation, *Gray*, 116 S. Ct. at 2080, or that there has been a fundamental miscarriage of justice, *Coleman*, 501 U.S. at 750.

In this case, Williams raised several of the present claims in his petition for a writ of habeas corpus before

the Virginia Supreme Court. His remaining claims are exhausted because they were never raised in state court and could not be raised in state court now. *See* Va. Code Ann. §§ 801.654(3)(2) and 801.654-1.

A. Defaulted Claims[3]

1. Cause and Prejudice Analysis

The U.S. Supreme Court has recognized at least three categories of "cause" which are sufficient to overcome a state procedural default: (1) counsel's inability to know of a legal or factual issue; (2) interference by the prosecution with the habeas petition; and (3) ineffective assistance of counsel. *See Murray v. Carrier*, 477 U.S. 478 (1986). In addition, a federal court may grant habeas relief in the "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." *McCleskey v. Zant*, 499 U.S. 467, 494 (1991).

2. Claims Barred under Slayton v. Parrigan

The Virginia Supreme Court ruled that several of Williams' state habeas claims were defaulted under *Slayton v. Parrigan*, 215 Va. 27 (1974), *cert. denied*, 419 U.S. 1108 (1975). Under the rule in *Slayton*, state habeas review is barred by the failure to raise an issue at trial and on

---

[3] Williams has numbered the claims in his federal habeas petition differently than in his state habeas petition. To avoid confusion, the Court will refer to the numbers designated in Williams' federal habeas petition.

direct appeal. *Id. Slayton* is a well-recognized bar to federal review. *See Spencer v. Murray*, 18 F.3d 229, 232 (4th Cir. 1994).

As a preliminary matter, Williams asserts that the Virginia Supreme Court mistakenly applied *Slayton* to Claims III(A)(5), III(A)(6), III(A)(7), and III(B)(11) because he raised those claims at trial and on direct appeal. A review of the record confirms that contention. Respondent correctly notes, however, that Williams did not raise these claims on federal constitutional grounds; rather, Williams solely argued matters of state law. Having failed to "fairly present" these claims as federal constitutional claims before the state's highest court, Williams cannot now "federalize" Claims III(A)(5), III(A)(6), and III(A)(7) for purposes of federal habeas review. *See Picard v. Connor*, 404 U.S. 270 (1971). As for Claim III(B)(11), the Virginia Supreme Court expressly ruled that it was procedurally defaulted under its Rule 5:25. Accordingly, because Williams has failed to show "cause" for the default of these claims, this Court is precluded from further reviewing Claims III(A)(5), III(A)(6), III(A)(7), and III(B)(11).

Williams can revive the remaining claims barred under *Slayton* if he can demonstrate cause and prejudice, or that there has been a fundamental miscarriage of justice. Williams asserts ineffective assistance of counsel as "cause" for these defaulted claims.[4] Because it is also the

[4] In order to establish "cause" for a procedural default, a claim of ineffective assistance of counsel must have been presented to the state courts as an independent claim. *See Murray v. Carrier*, 477 U.S. 478, 489 (1986) (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)). In other words, an assertion of ineffective assistance of counsel cannot constitute "cause" excusing a procedural default where the underlying allegation of ineffectiveness is itself procedurally barred. *See Justus v. Murray*, 897 F.2d 709 (4th Cir. 1990).

freestanding theory advanced in Claim V, it is discussed as part of the general discussion in Claim V. As noted below, this Court has determined that the ineffective assistance of counsel claims set forth by Williams in Claim V are meritless. Accordingly, Williams cannot establish "cause" for the *Slayton* procedural default. *See infra* at 56-94. This Court is therefore precluded from reviewing Claims III(A)(1), III(A)(2)(a)-(c), III(A)(4), III(A)(5), III(A)(6), III(A)(7), III(B)(1), III(B)(4), III(B)(7), III(B)(8), III(B)(9), III(B)(10), III(B)(11), IV(A)(3), IV(A)(4), IV(B)(1), IV(B)(2), VI, VII(G),[5] VII(H),[6] VII(I)[7].

3. Claims Never Presented in State Court

Williams failed to present the following claims at the state court level: I(A), I(C), III(A)(2)(b),[8] III(A)(2)(d),[9]

[5] To the extent Williams relies on the prosecutor's closing arguments.

[6] Williams concedes that this claim is procedurally defaulted. *See* Pet'r Opp'n at 79.

[7] To the extent Williams relies on the length of time he will spend on death row.

[8] This claim is barred under *Slayton*. *See infra* at 23-24.

[9] Williams argues that Respondent has misconceptualized his argument that the trial court seated a jury predisposed to impose a death sentence in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968). *See* Pet'r Opp'n at 22. Williams asserts that he has never argued this claim independent of his claims

III(A)(3), IV(A)(2), IV(A)(5), V(A)(3)(b),[10] V(A)(5)(b),[11] V(C)(1),[12] V(C)(2),[13] VII(A),[14] and VII(H)[15]. Despite this procedural bar, these defaulted claims will be revived for purposes of federal habeas review if Williams can show (1) cause for, and prejudice from, the default; or (2) the existence of a fundamental miscarriage of justice.

Claims I(A) and IV(A)(5)

Williams claims that his constitutional rights to be tried by an impartial jury and to be tried based only on the evidence presented at trial were violated by the presence of Juror Stinnett on the jury. Juror Stinnett's former husband was Deputy Sheriff Claude B. Meinhard, the detective who interviewed Cruse about the murders and who testified for the Commonwealth. Furthermore, the prosecutor, Robert G. Woodson, Jr., had represented Deputy Meinhard during his divorce. Although asked on voir dire whether she was related to any of the witnesses or if she or any family member had ever been represented by

---

regarding Jurors Trent, Holman, and Davis. Thus, it is a mischaracterization to state that it was never raised in state court proceedings and it should therefore not be dismissed separately.

[10] *See infra* at 64.

[11] *See* infra at 67-68.

[12] Respondent concedes that this claim was raised in Williams' state habeas petition. *See* Resp't Reply at 26.

[13] Respondent concedes that this claim was raised in Williams' state habeas petition. *See* Resp't Reply at 26.

[14] *See infra* at 43.

[15] *See supra* note 6.

any of the attorneys involved in the case, Juror Stinnettt never revealed her former marriage to Deputy Meinhard or that they had four children together. Prosecutor Woodson never mentioned his representation of Deputy Meinhard either. As a result, Williams argues that defense counsel could not conduct meaningful voir dire and could not intelligently exercise their peremptory challenges or challenges for cause. Thus, Williams contends that he was deprived of a fair trial under *United States v. Bynum*, 634 F.2d 768, 771 (4th Cir. 1980).

In response, Respondent argues that Williams has procedurally defaulted these claims because he failed to raise them on state habeas. Moreover, even if Williams could surmount the "cause" hurdle, he has failed to demonstrate "prejudice." Juror Stinnett divorced Deputy Meinhard fifteen years prior to the trial, and Deputy Meinhard was an insignificant witness for the Commonwealth. Indeed, Respondent points out that the defense did not cross-examine Deputy Meinhard, and his credibility was never at issue.

Irrespective of Deputy Meinhard's importance as a witness, however, if Williams can demonstrate "cause" for the procedural default, he will have automatically demonstrated "prejudice" under *Bynum*. In *Bynum*, the Fourth Circuit reversed a conviction because a juror, when asked whether he had a relative or close friend who had been either a defendant or victim of a crime, failed to reveal his brother's existence as a convicted felon. In so holding, the Fourth Circuit stated:

> Certainly when possible non-objectivity is secreted and compounded by the deliberate untruthfulness of a potential juror's answers on

> *voir dire*, the result is deprivation of the defendant's rights to a fair trial. [The juror] by his concealment impaired the right of [the defendant] to exercise intelligently a peremptory challenge to remove a juror who was suspected of being partial.

Bynum, 634 F.2d at 771 (footnotes omitted); *see also United States v. Brown*, 799 F.2d 134 (4th Cir. 1986) (voir dire that has the effect of impairing the defendant's ability to meaningfully and intelligently exercise his challenges is grounds for reversal).

Like the juror in *Bynum*, Juror Stinnett deliberately failed to tell the truth on voir dire.

> COURT: Have you or any member of your immediate family ever been represented by [Mr. Woodson]?
>
> JURORS: (Two [Stinnettt and Carter] have no affirmative response.)

Tr. 1-3-94 at 116.

> COURT: Are any of you involved in law enforcement?
>
> JURORS: (No affirmative response.)
>
> COURT: Are any of you related to the following people who may be called as witnesses . . . Deputy Sheriff Claude Meinhard . . . ?
>
> JURORS: (No affirmative response.)

Id. at 123-24. Like the juror in *Bynum*, Juror Stinnett's intentional nondisclosure on voir dire gives rise to a presumption of actual bias. Assuming that Prosecutor

Woodson knew of Juror Stinnett's relationship to Deputy Meinhard based on his representation of Deputy Meinhard in the divorce, his subsequent failure to advise the court or defense counsel of Juror Stinnett's dishonesty had a substantial and injurious effect on Williams' ability to select impartial jurors.

Although Respondent argues that Williams has failed to demonstrate "cause," the Court disagrees. There is no evidence that Williams' defense or state habeas counsel knew or could have known of Juror Stinnett's relationship to Deputy Meinhard absent disclosure by the prosecutor. Because Prosecutor Woodson never notified the court or defense counsel of his prior representation of Deputy Meinhard or of his knowledge of Deputy Meinhard's relationship to Juror Stinnett, the Court finds that this information was not reasonably available to defense counsel and that they were unable to know of this issue. Accordingly, the Court will grant an evidentiary hearing on these allegations of juror and prosecutorial misconduct. The motion to dismiss this claim will be denied.

Claim I(C)

Williams argues that three jurors improperly considered his parole eligibility during the sentencing phase of his trial – specifically, the jurors reported that they believed Williams would be released after 33 years if given a life sentence. Williams now argues that the jurors' consideration of this extrajudicial evidence violated his right to be convicted solely on evidence introduced in open court. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982).

The Court will dismiss this claim because it is procedurally defaulted. Even if Williams could demonstrate "cause," he has failed to show that the jurors' internal discussion prejudiced him. Such evidence is inadmissible under Rule 606(b) of the Federal Rules of Evidence, and Williams has failed to prove that the jury's internal discussion of parole constitutes impermissible "extrajudiciall, evidence to circumvent Rule 606(b)'s bar.

Claim III(A)(3)

Williams argues that the trial court erred when it refused to permit in-depth individual questioning on voir dire regarding pretrial publicity. Respondent asserts that this claim is procedurally defaulted because Williams failed to raise it in state court. Because Williams offers no "cause" for the default, the Court will dismiss this claim.

Claim IV(A)(2)

In September 1993, while incarcerated for the Keller murders, Cruse was evaluated by a psychiatrist who reported that "[Cruse] has little recollection of [the Keller murders], other than vague memories, as he was intoxicated with alcohol and marijuana at the time." Pet'r Ex. D. Despite being ordered to disclose all *Brady* material, the Commonwealth failed to provide this report to Williams' defense counsel. Williams now argues that this violation substantially impaired his ability to cross-examine and impeach Cruse.

The prejudice resulting from the Commonwealth's failure to comply with its *Brady* obligations is clear. As

noted in the discussion of Claim IV(A)(1), Cruse played a critical role in the Commonwealth's case against Williams. Because both defendants offered drastically different versions of the shootings, Cruse's testimony on the triggerman issue and his credibility as a witness determined who would be convicted of capital murder. Information that Cruse had little to no recollection of the murders would have undoubtedly undermined his credibility and cast doubt on his ability to remember the shootings with such detail.

Irrespective of this showing of "prejudice," Respondent argues that this claim is procedurally defaulted because Williams has failed to demonstrate why this claim could not have been discovered with due diligence in time to be raised in state court. The Fourth Circuit has held that "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." *Hoke v. Netherland*, 92 F.3d 1350, 1355 (4th Cir.) (citation omitted), *cert. denied*, 117 S. Ct. 630 (1996).

Although defense counsel were entitled to rely on the belief that the prosecution would comply with the Constitution and thus produce all *Brady* material upon request,[16] Williams fails to explain to the Court how the report came to the attention of federal habeas counsel and why it could not have been previously discovered through the exercise of due diligence on the part of state habeas counsel. Williams has apparently been afforded

---

[16] *See Dobbs v. Zant*, 113 S. Ct. 835, 836 (1993).

the same type of assistance at both state and federal habeas – namely, court-appointed attorneys. The Court cannot discern any reason and has been offered no explanation why state habeas counsel failed to discover the report and present it in state habeas proceedings. Accordingly, the Court will dismiss this claim.

VI. CLAIMS ADDRESSED ON THE MERITS

A. Applicable Law

1. Standard of Review

Under the recently revised Title 28 United States Code Section 2254, a federal court may not grant a writ of habeas corpus based on any claim that was adjudicated on the merits in state court unless the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Although this new standard requires more deference to state court findings, it is not a complete abdication of the federal court's duty to provide meaningful review.

2. Harmless Error

Federal habeas courts routinely conduct harmless error analysis of errors occurring in capital cases. *See, e.g.,*

Cabana v. Bullock, 474 U.S. 376, 391 n.6 (1986); *Smith v. Dixon*, 14 F.3d 956, 978 (4th Cir.) (en banc), *cert. denied*, 513 U.S. 841 (1994). In federal habeas corpus proceedings, an error is deemed harmful only if it "had substantial and injurious effect or influence in determining the jury's verdict." *Chapman v. California*, 386 U.S. 18, 24 (1967) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quotation omitted)).

3. New Rule Doctrine

Where a federal habeas petitioner seeks relief by application of a constitutional rule, the Court must examine the rule to determine whether it had been announced at the time the petitioner's conviction became final or whether the petitioner is seeking an extension of long-standing precedent. As a general matter, federal courts may not grant state prisoners relief in collateral proceedings if to do so would create a "new rule" of constitutional law, subject to two narrow exceptions."[17] *See Teague v. Lane*, 489 U.S. 288 (1989). Since *Teague*, the U.S. Supreme Court has articulated the test to determine whether a rule is a "new rule" such that it should not be applied retroactively:

---

[17] Under *Teague*, a "new rule" should be applied retroactively if (1) it "plac[es] certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe," or (2) it is a "watershed rule[s] of criminal procedure," implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague v. Lane*, 489 U.S. 288, 311 (1989).

> Though we have offered various formulations of what constitutes a new rule, put "meaningfully for the majority of cases, a decision announces a new rule 'if the result was not dictated by precedent existing at the time the defendant's conviction became final.' "

Gilmore v. Taylor, 508 U.S. 333, 340 (1993) (citation omitted).

Where the petitioner requests the Court not to apply a rule announced after his conviction became final, but to adopt a rule not previously announced, the Court must first determine whether such a rule would be retroactively applied if adopted. If the court determines that the rule, if adopted, would not be retroactively applied, then the Court should dismiss the claim without reaching the merits. *See Penry v. Lynaugh*, 492 U.S. 302 (1989). Under *Teague*, a court faced with this situation should proceed in three steps. First, the Court must ascertain the date on which the conviction and sentence became final. Second, the Court must determine whether a state court considering the defendant's claim on that date would have felt compelled by existing precedent to conclude that the rule sought by the petitioner was required by the Constitution. Third, even if the Court determines that the petitioner seeks the benefit of a new rule, the Court must decide whether the rule falls into one of the two *Teague* exceptions. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994).

Even if the Court determines that the petitioner does not seek to apply or adopt a "new rule", the Court must still "inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent."

Stringer v. Black, 503 U.S. 222, 228 (1992). The Court should be mindful, however, that the "new rule" doctrine is not necessarily implicated every time the Court applies an established standard to a new set of facts. *See id.*

B. Claims Barred Under *Hawks v. Cox*

The Virginia Supreme Court ruled that Claims II(A), III(A)(8), III(B)(3), III(B)(5), III(B)(6), VII(A), VII(B), VII(C), VII(D), VII(E), VII(F), VII(G), and VII(I) were barred under the rule in *Hawks v. Cox*, 211 Va. 91 (1970). "*Hawks*, however, is not a true procedural default rule. . . . *Hawks* cannot prevent federal habeas review of federal constitutional claims properly raised on direct appeal." *Turner v. Williams*, 35 F.3d 872, 890 (4th Cir. 1994) (citation omitted), *overruled on other grounds, O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996). Therefore, the Court must determine whether Williams raised the aforementioned claims on direct appeal.

A review of the record indicates that Williams did present the claims, albeit more general versions, on direct appeal of his conviction. The record further discloses that the Virginia Supreme Court adjudicated those claims on the merits. Although this Court has reviewed the aforementioned claims, it may only grant relief in limited circumstances. *See* 28 U.S.C. § 2254(d). As demonstrated below, none of the statutory exceptions apply and the Court will not grant relief as to these claims.

Claim II(A)

Williams argues that the evidence adduced at trial was insufficient to establish beyond a reasonable doubt that he was the "triggerman." Under Virginia law, only the immediate perpetrator of a murder may be convicted of capital murder and only after being found beyond a reasonable doubt to be the triggerman who fired the fatal shot. *See* Va. Code § 18.2-18; *Johnson v. Commonwealth*, 220 Va. 146, 150 (1979), *cert. denied*, 454 U.S. 920 (1981). Williams argues that given the facts in his case, it is impossible to determine whether he or Cruse fired the fatal shots. Williams accordingly argues that even if the Court is unwilling to reverse at the guilt stage, he should be granted a new sentencing hearing in order to determine on which capital convictions the jury recommended the death penalty.

In evaluating a claim based on insufficiency of the evidence, the reviewing court must view the evidence in the light most favorable to the prosecution. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The critical inquiry is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id.* at 318. "But this inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 318-19.

The evidence at trial painting Williams as the triggerman primarily consisted of the testimony of Cruse. Cruse

testified that Williams fired all of the shots that killed Mr. Keller and fired two of the three shots that killed Mrs. Keller. Williams himself admitted to firing the first shot into Mr. Keller's head. While the physical evidence does not directly prove that Williams was the triggerman, Cruse's testimony and Williams' own testimony, when viewed in the light most favorable to the Commonwealth, convincingly demonstrate that Williams played a "direct part in inflicting injuries" and is thus liable for capital murder. *See Strickler v. Commonwealth*, 241 Va. 482, *cert. denied*, 502 U.S. 944 (1991). Williams' argument that Cruse fired the first and fatal shot at Mrs. Keller was presented to the jury and the Virginia Supreme Court which found that it did not have merit in the face of the other testimony linking Williams to the shootings. Simply, the jurors chose to believe Cruse over Williams' and credibility determinations are properly within their province. Thus, after reviewing the evidence in the light most favorable to the prosecution, the Court finds that a rational trier of fact could have found beyond a reasonable doubt that Williams, and not Cruse, was the triggerman.

Claim III(A)(8)

Williams argues that the trial court erred when, over defense counsel's objection, it allowed the prosecutor to impeach Williams' testimony by referring to the fact that Williams was the only witness permitted to stay in the courtroom and thus, hear the testimony of all the other witnesses. Williams contends that this error impermissibly burdened his constitutional right to confront his accusers, to be present at all times during his trial, to present evidence in his favor, and to compel process.

Respondent argues, however, that existing case law does not prohibit a prosecutor from commenting in such a manner and that to grant federal collateral relief on this claim would violate the "new rule" doctrine.

A survey of existing caselaw confirms Respondent's contention. Although Williams argues that *Griffin v. California*, 380 U.S. 609 (1965) (Fifth Amendment violation to comment on the defendant's failure to take the witness stand), and *Brooks v. Tennessee*, 406 U.S. 605 (1972) (Fifth Amendment violation to require the defendant to testify first for the defense or not at all), implicitly support his position, the Court finds that the result urged by Williams is not dictated by existing precedent. To hold otherwise would create a "new rule" which this Court is severely restricted from doing under *Teague* and its progeny.

Although the Court has concerns about the propriety of the prosecutor's comments in this particular case, prosecutorial impeachment of the defendant's testimony through this type of cross-examination has not yet been held violative of the defendant's constitutional rights – notwithstanding Williams' persuasive *Brooks* argument to the contrary. Although the Court must thus deny Williams relief on this claim, a final point needs to be made. In rejecting this claim on direct appeal, the Virginia Supreme Court stated "[w]e fail to see how [Williams, constitutional] rights are violated by a question that reflected what the jury already knew." *Williams*, 248 Va. at 544. In *Griffin*, the U.S. Supreme Court rejected this exact rationale in the context of prosecutorial comment on the defendant's failure to testify:

> What a jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

380 U.S. at 614-15. This Court similarly finds this aspect of the Virginia Supreme Court's justification for dismissing the claim erroneous and unpersuasive.

Claim III(B)(3)

Williams argues that the trial court erred in denying his motion for jury instructions on the meaning of a life sentence and his mandatory 30 year ineligibility for parole. In support of this argument, Williams cites *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994), wherein the U.S. Supreme Court held that a sentencing jury must be instructed that a capital defendant is ineligible for parole when the prosecution argues "future dangerousness." Recently, however, the U.S. Supreme Court held that *Simmons* constitutes a "new rule" for purposes of habeas review and thus, cannot be used to overturn a habeas petitioner's death sentence. *See O'Dell v. Netherland*, 117 S.Ct. 1969 (1997). Accordingly, Williams' claim which seeks "a logical and modest extension" of *Simmons* is likewise barred under the *Teague* doctrine.

Claim III(B)(5)

Williams argues that the trial court erred in allowing the prosecutor to present evidence of the unadjudicated Prince Edward County homicides at the penalty stage as proof of "future dangerousness." Courts have uniformly

rejected the argument that evidence of prior unadjudicated criminal conduct cannot be considered in assessing "future dangerousness." *See, e.g., Eaton v. Angelone*, 1998 WL 128570, *9 (4th Cir. 1998) (citing cases); *see also Jurek v. Texas*, 428 U.S. 262, 276 (1976) (stating that the jury must "have before it all possible relevant information about the individual defendant whose fate it must determine"). Thus, the Virginia Supreme Court's rejection of Williams' claim was not contrary to, or an unreasonable application of, clearly established federal law.

Claim III(B)(6)

Williams argues that not only did the trial court err in allowing evidence of unadjudicated crimes, but that it failed to instruct the jury that such crimes must be proved beyond a reasonable doubt in order to be used in the sentencing determination. This Court has repeatedly rejected claims that Virginia's "future dangerousness" factor is unreliable because it may be proved with evidence of unadjudicated crimes. *See, e.g., Breard v. Netherland*, 949 F.Supp. 1255, 1267 (E.D. Va. 1996) (Williams, J.), *aff'd*, 134 F.3d 615 (4th Cir. 1998); *Pruett v. Thompson*, 771 F.Supp. 1428, 1442-43 (E.D. Va. 1991) (Spencer, J.), *aff'd*, 996 F.2d 1560 (4th Cir.), *cert. denied*, 510 U.S. 984 (1993); *see also Richardson v. Johnson*, 864 F.2d 1536, 1541 (11th Cir.) (citing cases), *cert, denied*, 490 U.S. 1114 (1989). Accordingly, the trial court did not err in refusing to instruct the jury that the unadjudicated Prince Edward County homicides must be proved beyond a reasonable doubt.

Claim VII(A)

Williams argues that the Virginia death penalty statutes are unconstitutional as they fail to provide the jury with any guidance on the meaning and use of mitigation evidence. The Fourth Circuit, however, has routinely rejected the claim that the standard Virginia sentencing instruction does not adequately inform the jury on the issue of mitigation. *See, e.g., Buchanan v. Angelone*, 103 F.3d 344, 347-48 (4th Cir. 1996) (holding that "Virginia's death penalty scheme survives constitutional scrutiny, despite its 'failure to instruct the jury on statutory mitigating factors' ") (citation omitted); *Jones v. Murray*, 947 F.2d 1106, 1119-20 (4th Cir. 1991), *cert. denied*, 503 U.S. 973 (1992); *Clozza v. Murray*, 913 F.2d 1092, 1005 (4th Cir. 1990), *cert. denied*, 499 U.S. 913 (1991). In light of this precedent, Williams' claim must fail.

Claims VII(B) and VII(C)

Williams argues that the "vileness" aggravating factor is unconstitutionally vague in that it does not define what constitutes "outrageously or wantonly vile, horrible or inhuman [conduct]." Va. Code § 19.2-264.4(C). The Virginia Supreme Court rejected this challenge outright as already addressed and answered by the decision in *Mickens v. Commonwealth*, 247 Va. 395, 402-403 (1994). The Fourth Circuit has likewise rejected this challenge on numerous occasions. *See, e.g., Turner v. Williams*, 35 F.3d 872, 891-94 (4th Cir. 1994); *Jones v. Murray*, 976 F.2d 169, 174 (4th Cir.), *cert. denied*, 505 U.S. 1245 (1992). The Court rejects Williams' claims for the same reasons.

Claims VII(D), VII(E), and VII(F)

In attacking the "future dangerousness" aggravating factor, Williams argues that it is unconstitutionally vague, misleading, and unreliable and that the use of unadjudicated criminal acts is improper. Fourth Circuit case law holds otherwise. *See Spencer v. Murray*, 5 F.3d 758, 764-65 (4th Cir. 1993), *cert. denied*, 510 U.S. 1171 (1994); *Giarratano v. Procunier*, 891 F.2d 483, 489-90 (4th Cir. 1989), *cert. denied*, 498 U.S. 881 (1990). Furthermore, for the reasons stated above with respect to Claims III(B)(5) and III(B)(6), the Court rejects these claims.

Claim VII(G)

Williams claims that the Virginia Supreme Court failed to engage in meaningful or fair appellate review of his case under Va. Code § 17-110.1, which requires the court to ensure that the death penalty was not "imposed under the influence of passion, prejudice or any other arbitrary factor." A review of existing case law reveals, however, that the existence of such a claim has never been recognized or alluded to by the U.S. Supreme Court. *See George v. Angelona*, 901 F.Supp. 1070, 1090 (E.D. Va. 1995), *aff'd*, 100 F.3d 353 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 854 (1997). Accordingly, the Court must dismiss Williams' challenge to the state appellate process as barred by the "new rule" doctrine.

Claim VII(I)

Williams argues that imposition of the death penalty constitutes cruel and unusual punishment in violation of

the Eighth Amendment. The Virginia Supreme Court, however, rejected this claim as already answered in *Beaver v. Commonwealth*, 232 Va. 521, 527, *cert. denied*, 483 U.S. 1033 (1987). The Fourth Circuit similarly has rejected this argument outright. *See Briley v. Booker*, 746 F.2d 225, 227 (4th Cir. 1984). Accordingly, this Court must also reject this claim of constitutional error.

C. Preserved Claims

1. Juror Misconduct

Claim I(B)

Williams asserts that a juror may have introduced extrajudicial evidence to the jury. Specifically, Williams claims that Juror Blanton may have received information from her husband, a Virginia State Trooper, who had previously arrested Williams on unrelated charges. Although the jury was sequestered during the trial, the jurors were allowed to return home after being selected. It is during this brief period of time that Williams believes Juror Blanton learned of his previous arrests from her husband – extrajudicial information which she may have then shared with her fellow jurors.

It is well-settled that "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . ." *Remmer v. United States*, 347 U.S. 227, 229 (1954). In the Fourth Circuit, this presumption of prejudice is established if "there is a reasonable possibility that the

jury's verdict was influenced by the material that improperly came before it." *United States v. Barnes*, 747 F.2d 246, 250 (4th Cir. 1984) (citations and quotations omitted).

In the instant case, however, Williams has failed to provide any evidence that Juror Blanton's husband told her about the previous arrests or that if factual, Juror Blanton shared this information with the other jurors. This omission is particularly glaring in light of the unrebutted affidavit submitted by Juror Blanton in the state habeas proceedings. *See* Resp't State Ex. E. In that affidavit, Juror Blanton unequivocally denies Williams' allegations. She states that she answered the trial court's voir dire questions truthfully; she never discussed the case with her husband until the trial concluded; no extrinsic information was communicated to her; and she had no knowledge of Williams' prior record until evidence of it was introduced at trial. *See id.* Although Williams is correct that the burden is on the government to prove that the jury's exposure to extrajudicial information was harmless, the Court need not reach that issue here because Williams has failed to establish the threshold issue – that extrajudicial information was, in fact, introduced to the jury.

In the absence of any rebuttal evidence, the Court does not find that the Virginia Supreme Court's dismissal of this claim was contrary to clearly established precedent or the result of an unreasonable determination of the facts. *See* 28 U.S.C. §§ 2254(d), (e). Accordingly, this claim will be dismissed.

2. Insufficiency of the Evidence

In evaluating a claim based on insufficiency of the evidence, the reviewing court must view the evidence in the light most favorable to the prosecution. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The critical inquiry is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id.* at 318. "But this inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 318-19.

Claim II(B)

Williams argues that the evidence adduced at trial was insufficient to establish beyond a reasonable doubt that the robbery and rape were committed sufficiently close in time and place to the shooting of the Kellers to elevate their subsequent murders to capital murder. Williams asserts that "[t]he rape and robbery had been completed long before the murders occurred." Pet. at 39. The Court finds that this assertion is clearly unsupported by the evidence.

It is undisputed that Williams and Cruse went to the Kellers' house intending to commit robbery. While there, Williams and Cruse ordered the Kellers to remove all their clothes, locked them in closets, searched the house, raped Mrs. Keller, and forced the Kellers to "take a walk" after they had showered and changed into clean clothes.

Shortly thereafter, Williams and Cruse killed the Kellers so as to not leave any witnesses. Based on the foregoing, the Court finds that the record amply supports the conclusion that the rape and robbery were sufficiently close in time and place to the murders to be predicate felonies for the capital conviction. Accordingly, this claim must be dismissed.

3. Trial Court Errors

Claim III(B)(2)

Williams claims that the trial court erred when it granted his request for a Bill of Particulars only as to prior unadjudicated acts of criminal conduct on the issue of "future dangerousness" Williams contends that had the trial court required the Commonwealth to specify before trial the components of the "vileness" aggravator, the Commonwealth would not have mistakenly introduced the photographs of the Prince Edward County victims to prove "vileness" and/or defense counsel would have had the opportunity to file a motion in limine in order to prevent the submission of the photographs. Williams argues that this error violated his Sixth Amendment right to be informed of the nature of the charges against which he must defend. *See, e.g., In re Ruffalo*, 390 U.S. 544 (1968); *Cole v. Arkansas*, 333 U.S. 196 (1948); *Rosen v. United States*, 161 U.S. 29 (1896).

On direct appeal, the Virginia Supreme Court rejected this due process claim:

> In our opinion, due process does not require that the Commonwealth limit itself to a pre trial

> construction of the character of Williams's conduct. Furthermore, Williams has no constitutional right to a bill of particulars if the indictments are sufficient to give him notice of the nature and character of the offenses charged, which these indictments do, so that he can make his defense. *Strickler v. Commonwealth*, 241 Va. 482, 490-91, 404 S.E.2d 227, 233, *cert. denied*, 502 U.S. 944 (1991); *Spencer v. Commonwealth*, 238, (sic) Va. at 303-304, 384 S.E.2d at 791.

Williams, 248 Va. at 538. Respondent argues that this Court must defer to the Virginia Supreme Court's reasonable rejection of Williams' claim and that to grant federal collateral relief would violate the "new rule" doctrine.

Pursuant to a recent U.S. Supreme Court decision, *Gray v. Netherland*, 116 S.Ct. 2074 (1996), the Court finds that Respondent is correct. In *Gray*, the U.S. Supreme Court held that granting relief on a petitioner's claim that he had a due process right to be given adequate notice of the evidence to be used against him during the penalty stage of his capital murder trial would require the adoption of a "new rule." *See id.* at 2084. Although Williams argues that he was not requesting "penalty-stage discovery," the Court finds otherwise. Because federal habeas relief is not available on a "notice-of-evidence" claim, the Court must dismiss this claim.

4. Prosecutorial Misconduct

Claim IV(A)(1)

Williams alleges that the Commonwealth violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose to the defense that Cruse did in fact have an agreement

with the Commonwealth for a life sentence in exchange for his testimony against Williams. Respondent points out, however, that both the Commonwealth's Attorney and Cruse's attorney have confirmed under oath that Cruse had no formal plea agreement with the Commonwealth at the time of Williams' trial. *See* Resp't State Ex. C, D (affidavits).

It is undisputed that prior to trial, the Commonwealth informed defense counsel that a plea agreement had previously been reached with Cruse, that the agreement had been breached by Cruse, and that the Commonwealth had revoked the agreement. However, the Commonwealth never produced a copy of the revoked written plea agreement to defense counsel. In fact, until the agreement was introduced by the Commonwealth at trial, defense counsel had thought that the agreement had been oral. *See* Aff. of R. Donald Ford, Jr. ¶ 8.

In any event, Williams contends that Cruse and the Commonwealth did have an understanding that Cruse would not receive the death penalty in return for his cooperation and testimony against Williams. In support of this allegation, Williams proffers the following:

(1) statements made by Cruse and the prosecutor during Cruse's direct and redirect examination which indicated that a plea agreement was expected as a result of Cruse's testimony against Williams;

> Q: You've indicated to the jury you're charged with capital murder right now; is that correct?
>
> A: Correct.

> Q: Is it your understanding that *the Judge is going to decide whether you live or die*?
>
> A: Correct.
>
> Tr. 1-4-94 at 212 (emphasis added).

(2) statements made by the prosecutor during closing arguments which raised a clear inference that there was a direct relationship between the content of Cruse's testimony and his sentence on charges of capital murder;

> [Cruse] sits here today facing the death penalty; he sits here facing capital murder, two counts of capital murder. *And like he told you right now his back is against the wall; if he lies, he dies,* and that is his situation.
>
> Tr. 1-6-94 at 52 (emphasis added).

(3) Cruse's plea of guilty to the capital murder of Mrs. Keller two months after Williams' conviction;

(4) the reduction of the charge of first degree murder of Mr. Keller to participation as a principal in the second degree;

(5) the fact that Cruse pled guilty before a trial date was ever set in his case; and

(6) the Commonwealth's sentencing recommendation that Cruse's life be spared.

Williams argues that when viewed together, this sequence of events strongly suggests that some sort of understanding or informal agreement existed between Cruse and the Commonwealth at the time of Williams' trial.

In dismissing this claim, the Virginia Supreme Court provided no insight as to the manner or reason by which it made its factual or legal determinations. The deferential standard mandated by 28 U.S.C. § 2254(d) therefore has less meaning in this situation. *See Cardwell v. Netherland*, 971 F.Supp. 997 (E.D. Va. 1997). The Court is mindful, however, that its review is restricted to those facts as presented in state court proceedings.

Pursuant to *Brady*, the Commonwealth is required to disclose evidence that is favorable to the defendant and "material either to guilt or punishment." *Brady*, 373 U.S. at 87. This includes impeachment evidence because "such evidence is 'evidence favorable to an accused' [ ] so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985) (internal citation omitted). Disclosure of such evidence is especially important where, as here, "the reliability of a given witness may well be determinative of guilt or innocence[.]" *Id.* at 677.

In the instant case, Cruse played a critical role in the Commonwealth's case against Williams. It is undisputed that the physical evidence could not conclusively establish who fired the fatal shots. Not only could it not be determined in what sequence the shots were fired, but the bullet fragments from Mr. Keller's wounds could not be identified. Given that both Cruse and Williams offered drastically different versions of the shootings,[18] Williams'

[18] Cruse testified that he fired only once – at Mrs. Keller – and that Williams fired all other shots. Williams, however, testified that he fired only once – the non-fatal wound to Mr. Keller's head – and that Cruse fired all other shots, including the three shots to Mrs. Keller's head.

conviction clearly hinged on the credibility of each defendant. As evidenced by the jury's verdict, the jury chose to believe Cruse over Williams. Had the jury known that Cruse had some sort of agreement, understanding, or expectation with the Commonwealth regarding his sentence for the Keller murders, there is little doubt that their assessment of Cruse's credibility would have been affected. As the U.S. Supreme Court has stated, "[t]he fact that the stake [in the petitioner's conviction] was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction." *Bagley*, 473 U.S. at 683.

Accordingly, Williams was entitled to know whether any informal understanding had been reached between Cruse and the Commonwealth prior to or at the time of Cruse's testimony at trial. There being no evidence that defense counsel had any knowledge of or access to such information other than the revoked written plea agreement,[19] the Court will grant Williams an evidentiary hearing on this claim. The motion to dismiss will be denied.

[19] *Hoke v. Netherland*, 92 F.3d 1350, 1355 (4th Cir.), *cert. denied*, 117 S.Ct. 630 (1996); *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990).

5. Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court set forth the standard for determining whether a criminal defense lawyer has acted so egregiously as to deprive the defendant of his Sixth Amendment right to counsel. Petitioner must establish two elements: first, that counsel's performance was deficient; and second, that the deficient performance prejudiced the defendant. *See id.* at 687. This is an exacting standard: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relief on as having produced a just result." *Id.* at 686.

Under the first prong, the petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. In order to avoid the distorting effects of hindsight, however, the Court must evaluate "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. The Court "must [also] appreciate the practical limitations and tactical decisions that trial counsel faced." *Bunch v. Thompson*, 949 F.2d 1354, 1363 (4th Cir. 1991), *cert. denied*, 505 U.S. 1230 (1992). Rather than second-guessing decisions which are the result of trial tactics or strategy, the reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *see also Williams v. Dixon*, 961 F.2d 448, 451 (4th Cir.), *cert. denied*, 506 U.S. 991 (1992); *McDougall v. Dixon*, 921 F.2d 518, 539 (4th Cir. 1990), *cert. denied*, 501 U.S. 1223 (1991).

The second prong of the *Strickland* test, the "prejudice" inquiry, requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable." 466 U.S. at 687. Accordingly, the petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.* Counsel's errors, even if unreasonable, must be shown to have "actually had an adverse effect on the defense." *Id.* at 693.

When analyzing ineffective assistance of counsel claims involving appellate counsel, the Fourth Circuit has held that appellate counsel are "entitled to a presumption that [they] decided which issues were most likely to afford relief on appeal." *Evans v. Thompson*, 881 F.2d 117, 125 (4th Cir. 1989), *cert. denied*, 497 U.S. 1010 (1990). Furthermore, counsel are not obligated to assert all nonfrivolous issues. Rather, "[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from incompetence, is the hallmark of effective appellate advocacy." *Smith v. South Carolina*, 882 F.2d 895, 899 (4th Cir. 1989), *cert. denied*, 493 U.S. 1046 (1990) (quotations and citations omitted).

The Virginia Supreme Court has considered and rejected the ineffective assistance of counsel claims discussed below. Under the new standard set forth in § 2254(d), this Court's review is limited to a determination of whether or not the Virginia Supreme Court's

resolution of these claims was a reasonable interpretation of the *Strickland* standard and other relevant U.S. Supreme Court precedent. However, this Court notes that the Virginia Supreme Court issued a one page summary order in Williams' state habeas petition.[20] Where the Virginia Supreme Court provides no insight as to the manner or reason by which it applied federal law to the facts of the case, a federal court must necessarily perform its own review of the record. The deferential standard mandated by § 2254(d)(1) has less meaning in this situation. *See Cardwell v. Netherland*, 971 F.Supp. 997 (E.D. Va. 1997).

Claim V(A)(1)

In his federal habeas petition, Williams argues that defense counsel's performance was constitutionally deficient because (1) counsel failed to object to the trial court's erroneous charge on the triggerman rule and the degrees of murder, and (2) counsel failed to preserve the claims regarding the trial court's refusal to give Williams' proposed Instructions #19 and #20.

On direct appeal, the Virginia Supreme Court, citing *Strickler v. Commonwealth*, 241 Va. 482, *cert. denied*, 502 U.S. 944 (1991), ruled that the trial court's Instruction #18 correctly stated the triggerman rule. *See Williams*, 248 Va. at 545. Under Virginia law, only the immediate perpetrator of a murder may be convicted of capital murder. *See*

---

[20] Specifically, the Virginia Supreme Court held that it found "no merit in petitioner's remaining allegations" and ordered that Williams' state habeas petition be dismissed. Order Upon a Petition for a Writ of Habeas Corpus, issued by the Virginia Supreme Court, March 18, 1996.

Va. Code § 18.218; *Johnson v. Commonwealth*, 220 Va. 146, 150 (1979), *cert. denied*, 454 U.S. 920 (1981). "[W]here two or more persons take a direct part in inflicting fatal injuries, [however,] each joint participant is an 'immediate perpetrator' for the purposes of the capital murder statutes." *Strickler*, 241 Va. at 495. Although there is conflicting evidence as to which shot actually killed the Kellers, Cruse's testimony and Williams' own testimony convincingly demonstrate that Williams played a "direct part in inflicting fatal injuries" and thus, is liable as an "immediate perpetrator" of the Kellers' murders. *See id.* That being the case, the Court finds that the trial court did not give an erroneous charge and that defense counsel did not perform ineffectively by failing to object.

As for defense counsel's failure to preserve the claims regarding the trial court's rejection of Williams' proposed instructions, the Virginia Supreme Court ruled that pursuant to *Jenkins v. Commonwealth*, 244 Va. 445, 460-61 (1992), *cert. denied*, 507 U.S. 1036 (1993), Williams had waived those claims because counsel merely "incorporate[d] by reference" the argument made in the trial court for consideration on appeal. *See Williams*, 248 Va. at 545. Assuming *arguendo* that counsel's performance was deficient in this regard, Williams must still demonstrate prejudice. He fails to do so in this case. The proposed instructions were not only a misstatement of Virginia law, but they directly contradicted the charge which was ultimately given to the Jury – a charge which the Virginia Supreme Court found to be a correct statement of Virginia law. Accordingly, the Court finds that Williams has failed to satisfy either prong of the *Strickland* test.

Claim V(A)(2)

Williams essentially argues that defense counsel failed to effectively impeach Cruse's testimony. Specifically, Williams takes issue with the following acts or omissions of defense counsel: (1) failure to object to leading questions; (2) failure to cross-examine Cruse on the rape of Mrs. Keller, his alleged breach of the plea agreement, his motives for testifying, his failure to take a polygraph examination as required by the plea agreement, the written plea agreement, his consumption of alcohol on the night of the murders, and his ability to recall the details of that night; (3) failure to interview Cruse or his lawyers regarding the nature, extent, or existence of a plea agreement; and (4) failure to interview law enforcement officers regarding the nature, extent, or details of any statements made by Cruse to law enforcement officers.

To rebut Williams' allegations, Respondent has submitted the unrebutted affidavit of Williams' defense counsel which was filed in the state habeas proceedings. Among other things, the affidavit details defense counsel's investigation into and preparation for Cruse's testimony. Specifically, defense counsel reviewed the Commonwealth's investigative file, Cruse's criminal record, Cruse's statements to the police, and Cruse's testimony at the preliminary hearings; interviewed the primary State Police investigator and the attorneys who represented Cruse at the preliminary hearings; and created a strategy to paint Cruse as "a person who repeatedly had lied to the police, and who, although he said he no longer had a plea agreement, was testifying the way he thought the prosecution wanted him to testify about

Williams' role in the offenses in order to save his own life." Resp't Federal Ex. D at 3. In light of defense counsel's representations, it appears that Williams' complaints amount to little more than second-guessing a trial strategy that did not work. Accordingly, the Court finds that Williams has failed to bear his burden of proving deficient performance and prejudice under *Strickland*.

Claim V(A)(3)

Williams claims that defense counsel were ineffective because they failed to investigate, develop, and present evidence of voluntary intoxication as a defense and to impeach his codefendant, Cruse, with evidence of his intoxication. Although Respondent addresses Williams' claim regarding intoxication as a defense, he argues that the claim regarding counsel's failure to impeach Cruse is defaulted because it was never raised in state court. The Court will address each contention in turn.

a. Intoxication as a Defense

The affidavit submitted by Williams' defense counsel belies his claim that they were ineffective in failing to mount a voluntary intoxication defense. In fact, the affidavit demonstrates that after a reasonable investigation, counsel determined that voluntary intoxication would not be a viable defense in Williams' case. Counsel based this conclusion on their multiple interviews with Williams in which he repeatedly gave "a consistent, coherent account" of the Kellers murders and Prince Edward County homicides; thorough research of Virginia law on

the issue of voluntary intoxication as a defense to premeditated murder; and Williams' own testimony at the guilt stage of trial. In counsel's opinion, Williams had the capacity for premeditation and the ability to act upon his plans, irrespective of the amount of alcohol or types of drugs he had consumed. Under *Strickland*, counsel's strategic decision to forego a voluntary intoxication defense after a reasonable investigation of that defense cannot be said to be so outside "the wide range of reasonable professional assistance[ ]" so as to constitute ineffective assistance of counsel. *Strickland*, 466 U.S. at 689.

b. Intoxication to Impeach Cruse

In his state habeas petition, Williams claimed ineffective assistance of counsel with respect to defense counsel's failure to argue intoxication to the jury as a basis for impeaching Cruse's testimony. In his federal habeas petition, Williams' claim is that defense counsel failed to cross-examine Cruse on the issue of intoxication. Respondent contends that the claims are distinct and having failed to present the latter in state court, Williams is barred from raising it on federal habeas review. The Court agrees.

Claim V(A)(4)

Williams premises this ineffective assistance of counsel claim on defense counsel's failure to object when the trial court allegedly omitted a jury charge on the Commonwealth's burden of proving beyond a reasonable doubt that Williams committed the crimes. Respondent contends that the record clearly refutes this claim.

During both the jury selection process and at the guilt stage, the trial court repeatedly informed the jurors that Williams was presumed innocent "and not guilty unless and until the Commonwealth proves each and every element beyond a reasonable doubt." *See, e.g.*, Tr. 1-3-94 at 20-21, 119-120, 155-56, 210-211, 264-265; 1-6-94 at 9. Furthermore, in the instructions listing the elements of each charged offense, the trial court stated that "the Commonwealth must prove beyond a reasonable doubt each of the following elements." Tr. 1-6-94 at 11-22. The trial court also instructed the jury that "[t]here is no burden on the defendant to produce any evidence." *See, e.g.*, Tr. 1-6-94 at 10.

Based on the foregoing, the Court is hard-pressed to find how defense counsel's performance could be deficient in this case when the record clearly shows that the trial court did instruct the jury on the burden of proof. Accordingly, the Court finds that Williams has failed to satisfy the *Strickland* test.

Claim V(A)(5)

Williams claims that defense counsel were ineffective on voir dire. Specifically, Williams argues that defense counsel failed to object to the trial court's alleged errors on voir dire, failed to rehabilitate three specific jurors, failed to object to confusing and misleading prosecutorial questions, failed to preserve the issue for appellate review, and failed to conduct extensive voir dire on the issue of pretrial publicity

a. Failure to Protect Right-to-Life Qualification Questions

1. & 2. Jurors Trent and Holman

The transcript of the jury selection proceedings reveals that Jurors Trent and Holman initially indicated that they could fairly consider giving the death penalty. Upon further questioning, however, Jurors Trent and Holman expressed serious reservations about imposing a death sentence regardless of the evidence presented and the instructions given by the court. Although the paper record is somewhat confusing as to the equivocal answers given by Jurors Trent and Holman, this Court is required to give deference to the state trial judge's findings of fact. *See* § 2254(e)(1). This Court must also refrain from second-guessing defense counsel's tactical decisions to not object to the prosecutor's questions, attempt further rehabilitation, or object to the exclusion for cause of Jurors Trent and Holman. Even assuming *arguendo* that defense counsel were deficient, Williams has failed to come forth with clear and convincing evidence to rebut the trial court's finding that Jurors Trent and Holman could not impartially consider imposing a death sentence. Accordingly, the Court finds that Williams has failed to satisfy the *Strickland* test.

3. Juror Bernard

Both the prosecution and the defense agreed to strike Juror Bernard for cause. Defense counsel's affidavit clearly demonstrates that counsel made a strategic decision to not object to the prosecutor's challenge for cause

because "we were of the opinion that, on balance, the juror's answers indicated she would be a pro-prosecution juror." Resp't Federal Ex. D at 2. Absent evidence to the contrary, the Court will not second-guess defense counsel's tactical decision. Furthermore, Williams has failed to demonstrate that except for counsel's failure to object to the removal of Juror Bernard for cause, there is a reasonable probability that the outcome of the proceeding would have been different.

b. Failure to Challenge Prospective Juror Stinnett for Cause

Respondent contends that this claim is barred from federal habeas review because it was never raised in state court. Williams argues, however, that this is Williams' first opportunity to present this claim because both the Commonwealth and Juror Stinnett withheld vital information on voir dire. Specifically, Juror Stinnett failed to reveal her former marriage to a prosecution witness, Deputy Sheriff Claude B. Meinhard who investigated the Keller murders; and the prosecutor failed to disclose that he had represented Deputy Sheriff Meinhard during his divorce proceedings.

Although the Court is troubled by these allegations, Williams has failed to demonstrate how defense counsel was deficient in failing to challenge Juror Stinnett for cause. Williams himself states that "*[i]f* counsel were aware to [sic] Stinnett's relationship to trial witness Meinhard, failed to reveal the relationship to Williams or to the court, and failed to move to strike Stinnett for cause, then counsel were ineffective under *Strickland* and

Williams was prejudiced." Pet'r Opp'n at 52 (emphasis added). Williams, however, has presented no evidence to establish that defense counsel actually knew of Juror Stinnett's former marriage to Deputy Sheriff Meinhard. Accordingly, the Court finds no basis for holding that defense counsel were ineffective in not questioning Juror Stinnett about matters of which counsel were completely unaware.

c. Failure to Conduct Extensive Voir Dire on the Issue of Pretrial Publicity

The Constitution guarantees criminal defendants a jury consisting of "impartial, indifferent" persons. *Murphy v. Florida*, 421 U.S. 794, 799 (1975) (citation omitted). In this case, several local newspaper stories were published about Williams and his involvement in the Keller murders as well as the Prince Edward County murders in the months leading up to his trial. In light of this, Williams argues that defense counsel were constitutionally ineffective at voir dire by failing to determine whether individual jurors had been influenced by pretrial publicity to Williams' prejudice.

As a preliminary matter, the Court notes that defense counsel did move for a change of venue which the trial court denied. As to the voir dire process, the trial transcript reflects that the trial judge questioned all the prospective jurors as to their exposure to pretrial publicity. *See, e.g.*, Tr. 1-3-94 at 56-57, 75-76. In those instances where a prospective juror had been exposed to pretrial publicity, the trial judge pursued the issue of prejudice.

> Have any of you formed any opinion as to the guilt or innocence by virtue of what you have heard or read?
>
> . . . .
>
> Considering what you have read about this case, do you believe that you can enter the jury box with an open mind and wait until the entire case is presented before you reach any fixed opinion or conclusion concerning the guilt or innocence of the accused?

Tr. 1-3-94 at 57. The trial judge then followed up his questions concerning exposure to pretrial publicity with questions concerning preconceptions about Williams' guilt. The judge also inquired about prejudice against both Williams and the Commonwealth. Finally, the judge gave defense counsel an opportunity to examine the prospective jurors. Contrary to Williams' assertion, defense counsel did pursue those prospective jurors who had admitted to being exposed to pretrial publicity. *See, e.g.*, Tr. 1-3-94 at 67-68, 85-86.

Given that the trial court had already reached "the heart of the issue with respect to pre-trial exposure to publicity – that is, whether the [prospective jurors] had developed a fixed pre-conception,"[21] the Court finds that defense counsel's tactical decision to not conduct a more detailed voir dire did not prejudice Williams' rights in this regard. Accordingly, Williams has failed to satisfy both prongs of the *Strickland* test.

---

[21] *Clanton v. Blair*, 619 F. Supp. 1491, 1501 (E.D. Va. 1985) (Merhige, J.)

Claim V(A)(6)

Prior to trial, Williams moved for the appointment of a private investigator to assist in investigating issues of mitigation evidence and a possible change of venue; the trial court denied the motion. On appeal, Williams argued that investigative assistance was required to investigate (1) Cruse's credibility and (2) the evidence of the Prince Edward County murders. Because these arguments were not presented to the trial court, the Virginia Supreme Court refused to consider the claim. *See Williams*, 248 Va. at 539. Williams now claims ineffective assistance of counsel on those grounds.

The Virginia Supreme Court has repeatedly held that an indigent capital defendant is not constitutionally entitled to the appointment of a private investigator. *See, e.g., Gray v. Commonwealth*, 233 Va. 313, 330 (1987); *Watkins v. Commonwealth*, 229 Va. 469, 478 (1985), *cert. denied*, 475 U.S. 1099 (1986). An indigent capital defendant is, however, entitled to be provided with "the basic tools of an adequate defense." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). This could include non-psychiatric experts if the defendant is able to make "a particularized showing of need for the assistance of such experts." *Husske v. Commonwealth*, 252 Va. 203, 211 (1996), *cert. denied*, 117 S. Ct. 1092 (1997).

In the instant case, Williams asserts that the discovery of a September 1993 psychological report on Cruse[22]

[22] Williams claims that the Commonwealth failed to disclose this report, which contained valuable *Brady* information, to defense-counsel. *See infra* Claim IV(A)(2).

is a prime example of information that would have been beneficial to Williams' defense, but that could not be discovered without an investigator. In the report, the consulting psychiatrist notes that Cruse has "little recollection of the event, other than vague memories[ ]" – information which would have been beneficial in challenging Cruse's trial testimony. Pet'r Ex. D. Respondent argues, however, that Williams is precluded by 28 U.S.C. § 2254(e)(2) from introducing this report in support of his federal habeas petition because it was never presented to the state courts in support of his state habeas petition.[23]

Although section 2254(e)(2) does not apply when a petitioner is denied the opportunity to develop a record in the state proceeding, Williams fails to explain to the Court how the report came to the attention of federal habeas counsel and why it could not have been previously discovered through the exercise of due diligence on the part of state habeas counsel. Williams has apparently been afforded the same type of assistance at both state and federal habeas – namely, court-appointed attorneys. The Court can therefore discern no reason and has been offered no explanation why state habeas counsel failed to

[23] The applicable section of the statute provides that "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows" and then provides limited exceptions. 28 U.S.C. § 2254(e)(2). Williams argues, however, that he did not "fail" to develop a factual basis in state proceedings; he was denied the tools necessary to do so by the Virginia Supreme Court. Section 2254(e)(2) does not apply when a petitioner attempts to develop a record in the state proceeding, but is denied that opportunity by the state court. *See Cardwell v. Netherland*, 971 F. Supp. 997 (E.D. Va. 1997).

discover the report and present it in state habeas proceedings. In light of this, Williams has failed to bear his burden of demonstrating that defense counsel were ineffective in failing to secure the appointment of an investigator, much less that there is a reasonable probability that the outcome of his trial would have been different.

Claim V(A)(7)

During the guilt phase, the Commonwealth presented the testimony of Mrs. Keller's mother and Mr. Keller's brother as a means of identifying the personal property taken from the Kellers' home. Prior to their testimony, defense counsel were apparently prepared to stipulate to the evidence. Williams argues that by failing to promptly do so, defense counsel allowed "unnecessarily emotional and inflammatory testimony" to be presented to the jury, thereby prejudicing his case. The Court finds, however, that Williams has failed to show that the stipulation, if accepted, would probably have changed the outcome of the trial. Accordingly, pursuant to *Strickland*, this claim must be dismissed.

Claims V(A)(8) & V(A)(9)

During the prosecution's arguments, defense counsel did not offer a single objection despite numerous instances in which the prosecutor allegedly misstated the evidence, interjected opinion, mischaracterized testimony, argued facts not in evidence, and made other improper arguments. Williams claims that he was, in

effect, without counsel during opening and closing arguments; thus, so he contends, defense counsel's performance was unconstitutionally deficient and he was prejudiced as a result.

Defense counsel state in their affidavit, however, that

> [a]s a matter of general strategy, we believe it is better not to object to a prosecutor's remarks or arguments to the jury unless absolutely necessary. Such objections run the risk of emphasizing adverse matters before the jury or giving the jury the impression the defense is trying to cover something up. In Michael Williams' case, we refrained from making such objections because, in our opinion, any such objections would have been overruled by the trial judge and the objections could have adversely affected our client in the jury's eyes.

Resp't Federal Ex. D at 4. Such a strategy appears reasonable and accordingly, did not render Williams' defense counsel constitutionally ineffective. Moreover, Williams has failed to show a reasonable probability that the outcome of either phase of the proceedings would have been different if defense counsel had made any or all of Williams' suggested objections.

Claim V(B)(1)

At the outset of the penalty phase, the Commonwealth called the mother of Mrs. Keller as a witness. Williams argues that her appearance was totally irrelevant and indeed, was "designed to elicit the juror's sympathy and arouse their anger against Williams." Pet'r Opp'n at 56. As a consequence, Williams claims that

defense counsel should have objected to her testimony and their failure to do so constitutes ineffective assistance of counsel.

On direct appeal, the Virginia Supreme Court assessed the testimony of Mrs. Keller's mother as follows: "[she] testified only as to her daughter's age and marriage to Mr. Keller and identified a photograph of the Kellers [as they appeared before their deaths]. The record does not disclose that [she] displayed any particular emotion during the short period of her testimony." *Williams*, 248 Va. at 548. Our review of the record concurs with this assessment.

The Court also agrees, however, with Williams' argument that the prosecutor could have argued the statutory aggravators based on previously admitted crime scene photographs which sufficiently depicted the vileness of the crime. Williams has not proferred [sic] any evidence, however, to establish that defense counsel's decision not to object on relevancy grounds was not a tactical decision. Moreover, Williams has failed to suggest any concrete evidence of prejudice as a result of his counsel's alleged deficient conduct. Accordingly, this claim must be dismissed.

Claim V(B)(2)

Williams argues that his defense counsel were ineffective in failing to timely object to photographs of the Prince Edward County victims and to properly argue the objection. The issue of the photographs arose during the Commonwealth's examination of the medical examiner, Dr. William Massello. Dr. Massello had been called to

identify the four victims of the Prince Edward County shootings and to establish their cause of death. In addition to the autopsy reports, the Commonwealth sought to introduce photographs of each victim's head[24] in order to establish "vileness." Defense counsel immediately objected and engaged in heated argument in the presence of the jury. The trial court finally admitted the photographs, but only after the Commonwealth changed the grounds for which they were offered – to establish "future dangerousness" and to corroborate the testimony of Williams' brother about the shootings. On direct appeal, the Virginia Supreme Court ruled that the photographs were properly admitted and rejected Williams' argument that the photographs need not be admitted because the same facts were contained in the autopsy reports.

Williams now argues that defense counsel were ineffective in failing to "foresee the inflammatory and prejudicial effect the Prince Edward photographs would have on the jurors and fail[ing] to object to their admission in advance of the medical examiner's testimony." Pet'r Opp'n at 57. The unrebutted affidavit submitted by defense counsel refuts [sic] this contention. *See* Resp't Federal Ex. D at 6. Moreover, as Respondent correctly notes, defense counsel did raise their objection to the photographs in a manner that was timely and specific enough to have the issue decided on appeal.

Even assuming that defense counsel's performance was deficient in failing to preempt the issue before it

---

[24] The photographs graphically demonstrated that each victim had been shot in the head and that parts of each head had been subsequently burned. *Williams*, 248 Va. at 547.

reached the jury, Williams has not shown that there is a reasonable probability that the outcome of the penalty phase would have been different if counsel had succeeded in keeping the photographs out – the autopsy reports which explicitly described the wounds of the Prince Edward County victims were already before the jury. Nor has Williams demonstrated that raising the objection outside the presence of the jury would probably have changed the ultimate sentence. For these reasons, this claim must be dismissed under *Strickland*.

Claim V(B)(3)

In addition to failing to prevent the admission of the Prince Edward County photographs, Williams claims his defense counsel were ineffective on the grounds that they did not attempt to develop defense evidence and mitigating information through the medical examiner's testimony. Williams' brother, John, had testified that he, Williams, and the Prince Edward County victims had been drinking heavily on the night of the shootings. Williams now argues that defense counsel should have attempted to posit an explanation for the shootings by cross-examining Dr. Massello – specifically, that a drunken Williams had acted out of provocation or self-defense when threatened by an equally intoxicated man with a gun. Respondent argues, however, that defense counsel made "a deliberate, tactical decision not to cross-examine Dr. Massello" which should not be second-guessed on habeas review. Resp't Mot. to Dismiss at 50-51.

The affidavit submitted by defense counsel in the state habeas proceeding confirms Respondent's contention:

> We were thoroughly prepared for Dr. Massello's testimony at the penalty stage regarding the autopsies of the four Prince Edward County victims. We had reviewed all of the autopsy reports and Dr. Massello's testimony was consistent with those reports. We decided, as a matter of trial strategy, not to cross-examine Dr. Massello. Our strategy was to get Dr. Massello off the witness stand as quickly as possible. We did not want to ask him any questions which might result either in his using the photographs of the victims to illustrate his response or in the prosecution's using the photographs again on redirect. The photographs were very damaging to the defense and we simply did not want to run the risk of making a bad situation worse.

Resp't Federal Ex. D at 5-6.

Furthermore, there is no evidence that Williams was prejudiced by defense counsel's failure to cross-examine Dr. Massello and elicit information on levels of intoxication and time of death. In fact, a review of the trial transcript shows that Williams' proposed justification for shooting the Prince Edward County victims would not have been borne out by the evidence. Dr. Massello testified that Villalobos, the victim who allegedly provoked Williams, was shot "to the back of the right side of the head. . . . And as opposed to being a round hole, that you would expect a bullet to make, this is a very ragged, sort of star-shaped appearing wound, and this is from the effects of *the muzzle of the gun being held in contact with the*

head at the time of discharge. . . . " Tr. 1-6-94 at 109, 112-13 (emphasis added). The other victims were also shot at fairly close range. *See, e.g.*, Tr. 1-6-94 at 128. In the face of evidence which clearly contradicts Williams, self-defense argument, the Court finds that Williams was not prejudiced by defense counsel's decision to not call further attention to Dr. Massello's damaging testimony.

Claim V(B)(4)

Williams also claims ineffective assistance of counsel with respect to defense counsel's failure to cross-examine his brother, John. Although John testified that he had passed out prior to the shootings and thus did not know anything about the shootings other than what his brother had confessed to him, Williams argues that defense counsel could have elicited favorable evidence relating to the issue of self-defense. Furthermore, Williams claims that defense counsel could and should have humanized him by questioning John as to Williams' concern for John on the night of the shooting, Williams' remorse over the shooting of one of the victims, and John's own willingness to help his brother.

Again, the affidavit demonstrates that defense counsel made a deliberate, tactical decision not to cross-examine John.

> [H]is testimony regarding what the defendant had told him about the Prince Edward homicides was a more favorable version of the event than what the defendant had told us. Johnny was a reluctant prosecution witness and it was our impression that the prosecution had not succeeded on direct examination in eliciting from

> him all the information it had hoped to elicit. . . . [W]e did not want to risk inadvertently eliciting such adverse information on cross-examination or giving the prosecution another chance to do so on redirect. Resp't Federal Ex. D at 6. Absent evidence to the contrary, the Court does not find that defense counsel acted unreasonably. Under *Strickland*, this claim must be dismissed.

Claim V(B)(5)

Williams claims that defense counsel were ineffective for failing to object when the prosecutor cross-examined Williams' mother and maternal grandfather about the events leading to Williams' arrest. On direct examination, defense counsel had questioned Williams' mother about family history and Williams' learning disabilities, drug abuse, and other problems; Williams' grandfather was called to testify about Williams' strong work ethic and positive relationships with family members. On cross-examination, however, the prosecutor focused exclusively on Williams' arrest and the role of Williams' mother in persuading her son to surrender – topics clearly beyond the scope of direct examination. Defense counsel then failed to conduct any redirect examination to rehabilitate these mitigation witnesses.

In their affidavit, defense counsel state that it would have been futile to object: "such an objection certainly would have been overruled on the grounds that the Commonwealth was entitled to cross-examine the witnesses on the issue of bias." Resp't Federal Ex. D at 6. The Court agrees with Williams, however, that "effective representation requires that counsel make appropriate objections to

limit harmful evidence at trial and to preserve that issue for further appellate review." Pet'r Opp'n at 60. Counsel's prediction that their objection might be overruled by the trial court does not excuse their failure to object to obviously improper cross-examination.

As arguably deficient as defense counsel's performance may have been in this regard, however, Williams has not alluded to any prejudice whatever arising from defense counsel's omission. There is no evidence that the outcome of the penalty phase would probably have been different had defense counsel objected. Williams has thus failed to meet the "prejudice" prong of the *Strickland* test, and the instant claim must be dismissed.

Claim V(B)(6)

Williams argues that defense counsel were ineffective in failing to present evidence of his drug and alcohol abuse as a mitigating factor during the sentencing phase. Evidence at the guilt phase established that Williams had been drinking heavily on the night of the Keller murders and the Prince Edward County shootings. Evidence at the penalty phase further established that Williams had an extensive history of drug and alcohol abuse. Defense counsel did not, however, argue Williams' state of mind, the effect of Williams' drug and alcohol intoxication at the time of both the Keller and Prince Edward County murders, or the effect of drug and alcohol use on Williams who suffers from Attention Deficit and Hyperactivity Disorder ("ADHD"). Once again, defense counsel's affidavit provides an explanation for this alleged deficiency.

Defense counsel assert that "[i]t was our strategy not to assert [Williams'] intoxication at the time of the crimes as an excuse for his actions, but rather as part of a continuing symptom of his overall disorder." Resp't Federal Ex. D at 5. A review of the record confirms that defense counsel pursued this strategy throughout the penalty phase. Through the testimony of Dr. Dewey Cornell, the clinical psychologist appointed to assist the defense, defense counsel established that Williams suffered from ADHD and elicited information on the negative effects that drug and alcohol abuse have on a person with ADHD. Defense counsel also called members of Williams' family to testify about Williams' learning disabilities and continuing drug addiction. And contrary to Williams' assertion, defense counsel did argue Williams' intoxication at the time of the Keller and Prince Edward County murders on summation, albeit not in as much detail as Williams would have liked. Given the fact that it is "common knowledge that many find it difficult to view the illegal use of narcotics under any circumstances as a mitigating factor,"[25] the Court cannot say that counsel's performance was unreasonable.

Although it is tempting to opine in hindsight what defense counsel could and should have done at the sentencing phase, that is not the province of this Court. It is Williams' burden to demonstrate both deficient performance and prejudice from defense counsel's alleged

---

[25] *Woomer v. Aiken*, 856 F.2d 677, 684 (4th Cir. 1988), *cert. denied*, 489 U.S. 1091 (1989).

mishandling of the issue of his drug and alcohol intoxication. Williams has not done so and thus, the claim must be dismissed.

Claim V(B)(7)

Williams next argues that defense counsel failed to protect the testimony of his mitigation expert, Dr. Cornell, from numerous objections and interruptions by both the prosecutor and the trial court. Other than the conclusory allegation that "[c]ounsel was wholly ineffective in addressing these issues," however, Williams has not provided any concrete evidence of deficient performance. On the contrary, the trial transcript clearly shows that defense counsel did respond, often times vigorously, to the prosecutor's attempts to limit Dr. Cornell's testimony. Defense counsel also challenged the trial court when it sought to advance the mitigation presentation. In light of this, the Court finds that Williams has failed to overcome the strong presumption that defense counsel's performance in presenting Dr. Cornell's testimony fell within the wide range of professionally competent performance. Moreover, Williams offers nothing more than mere speculation as to the prejudicial effect of defense counsel's conduct on his-case. Under *Strickland*, more is required; this claim therefore fails.

Claim V(B)(8)

Williams claims ineffective assistance of counsel based on defense counsel's failure to request an evaluation of Williams by a neuropsychologist to determine whether he suffered from brain dysfunction. In the state

habeas proceeding, Williams submitted the affidavit of a neuropsychologist, Dr. Robert Hart, who, after reviewing the testimony and evidence presented at trial, concluded that there was an indication of possible brain dysfunction which clearly required a thorough neuropsychological examination. Williams now contends that defense counsel's failure to pursue such an examination constitutes deficient performance and prejudiced his case.

Defense counsel responds, however, that they thoroughly consulted with Dr. Cornell, their mitigation expert who was familiar with the field of neuropsychology, and specifically discussed the possibility of organic brain dysfunction. Specifically, defense counsel state in their affidavit that:

> Dr. Cornell never indicated to us that further testing or evaluation was necessary or advisable. We specifically discussed with Dr. Cornell whether Michael Williams had organic brain damage because we were aware, and Dr. Cornell was aware, that at the time of Michael's birth there had been complications which reportedly had resulted in Michael not breathing for a period of time. Dr. Cornell, however, informed us that he had performed his own tests, including several standard neuropsychological tests, and satisfied himself that no further testing was indicated.
>
> . . . If Dr. Cornell had informed us that further evaluation was necessary or advisable, we would have requested the trial judge to authorize such an evaluation.

Resp't Federal Ex. D at 7-8.

Regardless of whether Williams believes that Dr. Cornell's neuropsychological assessment was inadequate, Williams has failed to prove that defense counsel's conduct was so objectively unreasonable as to constitute deficient performance. *See, e.g., Pruett v. Thompson*, 996 F.2d 1560, 1573-74 (4th Cir.), *cert. denied*, 510 U.S. 984 (1993). Defense counsel asked other members of the criminal defense bar to recommend a mitigation expert who would begin an evaluation on Williams' side; provided Dr. Cornell with all of the relevant information concerning the crimes and Williams' life history; and consulted with Dr. Cornell on numerous occasions prior to trial. Based on the foregoing, the Court finds that Williams received effective assistance of counsel within the meaning of *Strickland*.

Claim V(B)(9)

During the penalty phase, defense counsel elected not to put Williams on the stand. Williams now claims that had he testified, defense counsel could have elicited beneficial mitigation and rebuttal evidence which would have provided the jury with a reason for imposing a life sentence. Williams asserts that this failure to present his testimony demonstrates the absence of any defense strategy because "there was simply no advantage to a decision to withhold his testimony at the sentencing phase given the magnitude of the crimes involved." Pet'r Opp'n at 65.

Defense counsel's affidavit belies this contention. The record reveals that defense counsel discussed the issue of testifying with Williams several times before trial, mid-

trial, and the night before he testified at the guilt stage. Counsel repeatedly advised Williams of all the benefits and risks involved in testifying, and informed Williams that the ultimate decision was his to make. Only after viewing Williams' performance on the witness stand at the guilt stage – in particular, his "very cold" demeanor – did defense counsel decide not to call him during the penalty phase and risk subjecting him to damaging cross-examination about the Prince Edward County shootings. *See* Resp't Federal Ex. D at 9. Under these circumstances, the Court is hard-pressed to find how defense counsel's performance could be deemed ineffective.

Claim V(B)(10)

At the conclusion of the penalty phase, the trial court failed to instruct the jury as to the nature and use of the mitigation evidence presented by Williams. Williams now claims that defense counsel's failure to object to the allegedly deficient jury instructions and to request a corrective mitigation instruction deprived him of effective assistance of counsel. As discussed previously with respect to Claim VII(A), however, the Fourth Circuit has routinely held that penalty stage instructions beyond the standard Virginia sentencing instruction are not constitutionally required, particularly on the issue of mitigation. *See, e.g., Buchanan v. Angelone*, 103 F.3d 344, 347-48 (4th Cir. 1996) (holding that "Virginia's death penalty scheme survives constitutional scrutiny, despite its 'failure to instruct the jury on statutory mitigating factors' ") (citation omitted); *Jones v. Murray*, 947 F.2d 1106, 1119-20 (4th Cir. 1991), *cert. denied*, 503 U.S. 973 (1992); *Clozza v. Murray*, 913 F.2d 1092, 1005 (4th Cir. 1990), *cert. denied*, 499

U.S. 913 (1991). Thus, defense counsel's conduct cannot be said to be deficient in this regard.

Claim V(B)(11)

For the reasons stated above with respect to Claims V(A)(8) and V(A)(9), this claim is likewise dismissed under *Strickland*.

Claim V(B)(12)

Williams claims that defense counsel presented ineffective argument at the penalty phase and failed to provide the jury with persuasive reasons to impose a sentence of life rather than death. Contrary to Respondent's assertion, Williams does specify those mitigating factors that defense counsel did not argue or argued ineffectively as well as those arguments that harmed Williams' case. *See* Pet. at 145-46. After reviewing the trial transcript, however, the Court does not find that defense counsel's argument was so lacking as to fall below the wide range of professionally competent performance.

In closing argument, counsel did discuss Williams' history of drug and alcohol abuse; traumatic events in his life, including sexual abuse and an unstable home; ADHD and its effect on Williams; his loving and close relationship with his family; and his intoxication on the night of the Keller murders and Prince Edward County shootings. Counsel also stressed that the jury had the option of imposing a life sentence regardless if they found either of the statutory aggravating factors and that there was enough hope for Williams that the jury should

impose a life sentence. *See* Tr. 1-7-94 at 208-212, 215-24. Absent post hoc rationalization, the Court cannot say that defense counsel's conduct was objectively unreasonable under *Strickland*.

Claim V(B)(13)

As a final matter, Williams claims that defense counsel's errors at the sentencing phase individually and collectively prejudiced his case. Aggregating alleged errors that themselves do not constitute ineffective assistance is not sufficient to meet the stringent standard under *Strickland*. *See Thomas-Bey v. Smith*, 869 F. Supp. 1214, 1230-31 (1994), *aff'd*, 67 F.3d 296 (4th Cir. 1995). Accordingly, this claim must be dismissed.

Claim V(C)(1)[26]

Williams claims that defense counsel, who were also appellate counsel, rendered ineffective assistance by failing to properly appeal the denial of proposed Instructions #19 and #20 to the Virginia Supreme Court. *See infra* Claim V(A)(1). Specifically, because appellate counsel merely " 'incorporate[d] by reference' the argument he made in the trial court," the Virginia Supreme Court refused to consider the claim on appeal. *Williams*, 248 Va.

---

[26] Respondent concedes that Claim V(C)(1) was raised in Williams' state habeas petition and dismissed by the Virginia Supreme Court on the grounds that it was without merit. *See* Resp't Reply at 26.

at 545. Williams argues that this omission of "an obviously winning issue" constitutes ineffective assistance of counsel on appeal. Pet. at 148.

As discussed previously with respect to Claim V(A)(1), however, assuming *arguendo* that counsel's performance was deficient in this regard, Williams must still demonstrate prejudice. Although the Court agrees that Williams is not required to demonstrate that the omitted claim would have resulted in a reversal on appeal, Williams must demonstrate that there is a reasonable probability that the outcome of the appeal would have been different. Given the Virginia Supreme Court's determination that the trial court's Instruction #18 was a correct statement of Virginia law, counsel's failure to properly appeal the issue would not have changed the outcome. Thus, the Court finds that Williams was not denied effective assistance of appellate counsel.

Claim V(C)(2)[27]

Williams next argues that counsel failed to properly preserve objections or properly frame its appeal of the trial court's erroneous restrictions of voir dire. Rather than specifically appeal the trial court's restrictions on questions concerning juror attitudes about the death penalty, counsel appealed the trial court's general denial of expanded voir dire. Williams argues that the failure to

[27] Respondent concedes that Claim V(C)(2) was raised in Williams' state habeas petition and dismissed by the Virginia Supreme Court on the grounds that it was without merit. *See* Resp't Reply at 26.

properly frame the issue under applicable U.S. Supreme Court precedent constituted ineffective assistance of counsel. Assuming *arguendo* that counsel was deficient in this regard, Williams has not demonstrated that there is a reasonable probability that the direct appeal decision would have come out any differently had counsel appealed the issue with more specificity. Accordingly, this claim must be dismissed.

Claim V(C)(3)

Williams' final claim is that appellate counsel failed to properly appeal the trial court's refusal to strike Juror Davis. At trial, defense counsel objected to Juror Davis on the ground that he strongly favored the death penalty. On direct appeal, however, appellate counsel proposed a different argument – namely, that the trial court applied the wrong disqualification standards. Noting that the latter objection was not made in the trial court, the Virginia Supreme Court dismissed the claim pursuant to its Rule 5:25. *See Williams*, 248 Va. at 540.

Whether appellate counsel should have narrowly tailored the appeal regarding juror exclusion to the treatment of each individual juror, the Court is not persuaded that counsel's failure to do so does falls [sic] outside the wide range of objectively reasonable performance. Given that Williams has alleged that the trial court treated Jurors Trent, Holman, Bernard, and Davis differently, it is not unreasonable for appellate counsel to have framed the appeal in such terms as would encompass the trial court's allegedly erroneous treatment of all these jurors.

The Court also notes that the state trial judge found Juror Davis to be impartial; this Court is required to give deference to that finding of fact. *See* § 2254(e)(1). In the absence of clear and convincing evidence to rebut the trial court's finding that Juror Davis could impartially consider imposing a life or death sentence, the Court finds that Williams has failed to establish prejudice resulting from appellate counsel's failure to litigate this specific claim on appeal. Under *Strickland*, this claim must be dismissed.

VII. CONCLUSION

Respondent's Motion to Dismiss the petition will be GRANTED IN PART AND DENIED IN PART. An Evidentiary Hearing will be GRANTED with respect to Claims I(A), IV(A)(1), and IV(A)(5).

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

DATE: April 13, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Petitioner,

Civil No. 3:96-CV-529

v.

J.D. NETHERLAND,
Warden, Mecklenburg Correctional Center,

Respondent.

MOTION FOR LEAVE TO INVOKE DISCOVERY

The petitioner, Michael Wayne Williams ("Williams"), by counsel, pursuant to Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts, moves for entry of an order granting leave to invoke discovery. Williams seeks leave to serve subpoenas *duces tecum* and to take the depositions of individuals who have information relating to the claims on which the Court has granted an evidentiary hearing. The hearing is scheduled on May 18, 1998. In support of this motion, Williams submits the following:

This Court's Order entered on April 13, 1998 granted Williams an evidentiary hearing on Claims I(A) (Juror Misconduct) and Claims IV(A)(1) and IV(A)(5) (Prosecutorial Misconduct).

In Claim I(A) Williams asserts that he was deprived of his due process right to a fair trial because Ms. Stinnett, the jury forewoman, failed to disclose at *voir dire* that her former husband was Deputy Sheriff Meinhard, one of the Commonwealth's witnesses at Williams' trial. Meinhard was the detective who interviewed Williams' co-defendant and chief accuser, Jeffery Cruse. Claim IV(A)(5) is a related claim, in which Williams asserts that the Commonwealth's Attorney also improperly failed to disclose the connection between the Commonwealth's witness, Deputy Meinhard, and juror Stinnett.

In Claim IV(A)(1) Williams asserts that the Commonwealth improperly failed to disclose its plea agreement or understanding with Cruse, the chief prosecution witness, thereby depriving Williams of due process and a fair trial.

Rule 6(a) vests this Court with the discretion to grant discovery in habeas cases where "good cause" is shown. Federal courts have adopted the "good cause" standard established in *Harris v. Nelson*, 394 U.S. 286 (1969), even though *Harris* was decided before the enactment of Rule 6. *See, e.g., Gilday v. Callahan*, 99 F.R.D. 308 (D. Mass. 1983). *Harris* holds that discovery is appropriate in habeas cases if it relates to specific claims as to which the Court concludes that the petitioner may prevail, if given the opportunity to further develop the facts relating to such claims. Williams submits that he has met the "good cause" requirement for discovery relating to Claims I(A), IV(A)(1) and IV(A)(5) by virtue of this Court's Order granting a hearing on those claims.

The discovery Williams requests is directly related to the claims which will be the subject of the May 18, 1998

hearing. Williams seeks leave to issue subpoenas *duces tecum* to the Commonwealth's Attorney, to the Sheriff of Cumberland County, and to the lawyers who represented Jeffrey Cruse seeking the production of documents relating to any plea agreement or understanding between the Commonwealth and Cruse. *See*, Statement of Materials Requested, attached as Exhibit A, ¶ 2. Such materials relate directly to Claim IV(A)(1).

Williams also seeks leave to subpoena documents from the Commonwealth's Attorney and the Sheriff of Cumberland County relating to the jury panel for Williams' trial. *See* Exhibit A, ¶ 1. Such documents relate directly to Claim IV(A)(5).

Williams seeks leave to issue deposition subpoenas to Ms. Stinnett, Sheriff Meinhard and the Commonwealth's Attorney for the purpose of discovery relating to Claim I(A) (Juror Stinnett's failure to disclose her relationship to Deputy Sheriff Meinhard) and Claim IV(A)(5) (the Commonwealth's Attorney's failure to disclose the Stinnett-Meinhard relationship). *See* Deposition Subpoenas, attached.

Williams seeks leave to issue deposition subpoenas to the Commonwealth's Attorney and to counsel for Jeffrey Cruse for the purpose of discovery relating to Claim IV(A)(1) (the Commonwealth's failure to disclose its plea agreement or understanding with Cruse). *See* Deposition Subpoenas, attached.

Conclusion

For the reasons stated, this Court should grant Williams' Motion for Leave to Invoke Discovery.

MICHAEL WAYNE WILLIAMS

By: /s/ Illegible
Counsel

Barbara L. Hartung, VSB #38062
1001 East Main Street, Suite 410
Richmond, Virginia 23219
(804) 649-1088

James E. Moore, VSB #14526
Theodore Adams, III, VSB #26708
Hill B. Wellford, III, VSB #38938
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
(804) 697-4127

[Certificate Of Service Omitted In Printing]

EXHIBIT A

STATEMENT OF MATERIALS REQUESTED
RELATING TO CLAIMS I(A), IV(A)(1) AND IV(A)(5).

1. All documents including notes, letters, memoranda, or any other written memorializations relating to the jury panel and/or the jury selection process in the case of *Commonwealth v. Michael Wayne Williams*.

2. All documents, whether public, privileged or under seal, including notes, letters, memoranda, or any

other written memorializations relating to (1) the testimony of Jeffrey Cruse at trial in the matter of *Commonwealth v. Michael Wayne Williams*, (2) any consideration offered or given for his testimony, (3) any agreements or understandings, formal or informal, between Cruse and/or his counsel and any representative of the Commonwealth relating to his testimony and/or the disposition of any then pending criminal charges filed against Cruse. If any document identified pursuant to this request is claimed to be privileged, provide a description of the document, the author of the document, the addresses(s) or recipients(s) of the document, the date of the document and the basis for the privilege claim. If any document identified pursuant to this request is claimed to be under seal, identify the date of the document, the date of the court order sealing the document, the jurisdiction entering the order, and the style and case number of the case in which the order sealing such document was entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,	)	
Petitioner,	)	Civil Action No. 3:95CV924
v.	)	
J.D. NETHERLAND, Warden,	)	
Respondent.	)	

PETITIONER'S MOTION TO ALTER OR AMEND THE COURT'S JUDGMENT OF APRIL 13, 1998, AND MEMORANDUM IN SUPPORT.

Petitioner, through counsel, moves the Court, pursuant to Fed. R. Civ. P. 59 (e) , to alter or amend its Order of April 13, 1998, and states as follows:

The Court granted petitioner an evidentiary hearing on Claims I(A) , IV(A) (1) , and IV(A) (5), and dismissed all remaining claims as procedurally barred or meritless. Without waiving any argument that all the dismissed claims should be heard, petitioner herein moves the Court to reconsider its ruling on Claims III(A)(1), III(A)(8), IV(A)(2), V(A)(1) and VII(G). For the reasons set forth below, petitioner respectfully maintains that the Court erred in dismissing these claims.

* * *

CLAIM IV(A)(2): The Commonwealth Failed To Disclose A Psychiatric Evaluation Of Cruse Containing Brady Material

The Commonwealth failed to disclose a psychiatric evaluation of the co-defendant, Cruse, in which Cruse admitted that he had "little recollection of [the Keller murders.]" Cruse was the only eyewitness to the Keller homicides and testified that Williams had fired all but one shot killing both victims. This Court held that the Commonwealth had violated its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), and that Williams was clearly prejudiced given the importance of Cruse's testimony. However, the Court held that petitioner had not demonstrated cause for his default. Opinion at 30-32.

Petitioner contends that this Court wrongly concluded that petitioner had failed to demonstrate cause for his failure to raise this claim in state court. In reaching this conclusion, the Court observed that although Williams had court-appointed attorneys in both state habeas and federal habeas, Williams had failed to state why the *Brady* claim could not be raised in state court. The Court has inadvertently overlooked petitioner's pleading on this issue. On March 10, 1997, in "Petitioner's Response To Warden's Reply Of February 21, 1997," petitioner explained how he was able to develop the bases for additional claims in federal court:

> Respondent reasons that Williams presented new claims in federal court, thus they must have been available in state court. Respondent willfully overlooks the fact that Williams' federal appointed counsel, unlike his state habeas counsel, were willing and financially able to fund a

> limited investigation on Williams's behalf [footnote omitted]. Because state habeas counsel was unable or unwilling to make the same personal financial commitment, and the state court would not provide funds for necessary services, the new claims now presented in Williams' federal petition were not reasonably available to Williams in state court.

Id. at page 6. In March 1997, petitioner had a motion for expert assistance pending before this Court so he could "develop and discover evidence further supporting the various claims . . . in his petition." *Ibid.* The Court later denied that motion.

The limited investigation funded by current federal counsel uncovered Cruse's psychiatric report when the investigator reviewed all known files on Cruse. Although state habeas counsel had examined the relevant files when preparing the state habeas petition, the psychiatric report at issue was not there. *See* Attachment I.[2] Given the nature and contents of the report, it is apparent that the report had been misplaced or misfiled as it should have been under seal. Current appointed counsel were, and remain, unable to fund a complete investigation on Williams' behalf. *No* expert assistance under 21 U.S.C. sec. 848(q) has been provided to Williams. Thus, additional evidence of *Brady* violations may exist, although counsel is unable to produce them.

---

[2] The original, notarized affidavit will be filed with the Court this week. A faxed copy of the affidavit is attached here.

Petitioner's efforts in state court to develop the evidence for a *Brady* claim concerning Cruse were successfully opposed by the Commonwealth at every turn. State habeas counsel, Eric White, wrote both the Commonwealth's Attorney who tried the case and Respondent's counsel, Donald Curry, on October 30, 1995, and requested "all materials and evidence in the possession, custody or control of the Commonwealth or its agents pursuant to the principles of *Kyles/Brady* that are material to the issues of Williams' guilt or sentence for capital murder." Attachment A at 2.

White specifically requested:

> 1.(a) All reports of physical or mental examinations, scientific tests, or experiments conducted in connection with the investigation of the offense . . . ;
>
> 1.(b) All psychological test[s] or polygraph examinations performed upon any prosecution witness and all documents referring or relating to such tests;
>
> * * *
>
> **9. A copy of all medical and psychiatric reports known to the prosecutor concerning any witness the prosecutor called at trial which arguabl[y] affected the witness's credibility, ability to perceive, or relate or recall events.**

See Attachment A at 2-3, 4.

White also requested permission to review the investigative files of the Cumberland County Sheriff's Office and the Prince Edward County Sheriff's Office. Attachments B1 and B2. On November 1, 1995, Respondent's

counsel replied to White and stated that he would not review the Commonwealth's materials for exculpatory or impeachment material as requested.[3] "I know of no authority that requires the Commonwealth, as respondent in a civil habeas proceeding, to comply with such a request from petitioner's counsel." Attachment C at 1, ¶ 3. Current counsel made the same request when preparing Williams' federal petition and received the same response. *See* Ex. F to Petitioner's Opposition to Respondent's Motion To Dismiss, filed on Feb. 3, 1997.

* * *

CONCLUSION

For the reasons stated, this Court should reconsider its ruling on the above claims and grant petitioner relief or, in the alternative, an evidentiary hearing.

Respectfully submitted,

MICHAEL WAYNE WILLIAMS
By: /s/ Barbara L. Hartung

Barbara L. Hartung,
VSB 38062
1001 East Main Street
Suite 504
Richmond, VA 23219
(804) 649-1088

---

[3] Respondent's position is in conflict with *Mooney v. Holohan*, 294 U.S. 103, 108 (1935), *Imbler v. Pachtman*, 424 U.S. 409, 427 n. 25 (1976), *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992), and the Rules of the Virginia Supreme Court [DR 8-102(4), EC 8-10].

James E. Moore,
VSB 14526
Theodore Adams, III,
VSB 26708
Hill B. Wellford, III,
VSB 38938
Christian & Barton, L.L.P.
909 East Main Street,
Suite 1200
Richmond, VA
23219-3095
(804) 697-4100

Virginia Capital
Representation
Resource Center
P.O. Box 506
1001 East Main Street
Richmond, VA
23204-0506
(804) 643-6845
Counsel for Petitioner

April 27, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Petitioner,

v. Civil Action
No. 3:96CV529

J.D. NETHERLAND, Warden,
Respondent.

COMMONWEALTH OF VIRGINIA
COUNTY OF HENRICO

AFFIDAVIT OF ERIC D. WHITE

Eric D. White, having first been sworn, states as follows:

1. On August 10, 1995, I was appointed to represent Michael Wayne Williams in his state habeas corpus proceeding.

2. Prior to filing Mr. Williams' habeas corpus petition with the Virginia Supreme Court, I reviewed the Cumberland County court files of Mr. Williams and of his co-defendant, Jeffrey Cruse.

3. I am certain that I examined Mr. Cruse's court file for the following reason. The file did not contain a transcript of his guilty plea, and I later wrote the circuit court requesting a copy of the transcript.

4. I have reviewed the attached psychiatric evaluation of Jeffrey Cruse, dated September 14, 1993, prepared by Dr. Mario Gomez. I have no recollection of seeing this report in Mr. Cruse's court file when I examined the file.

Given the contents of the report, I am confident that I would remember it.

5. If I had seen the report, I would have included a *Brady* claim in Mr. Williams' state habeas petition based on this report.

/s/ Eric D. White
ERIC D. WHITE

Subscribed and sworn to before me this ____ day of April, 1998:

_____
NOTARY PUBLIC

My Commission expires: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

[Caption Omitted In Printing]

AFFIDAVIT

1. My name is Bonnie Stinnett. I was a juror in the capital murder trial of Michael Wayne Williams that took place in Cumberland County Circuit Court in January of 1994.

2. I married Claude Meinhard in 1962. During our marriage, we had four children. We divorced in 1979. Since our divorce, Claude and I have occasion to speak only one or two times a year.

3. When I was being asked questions by the Judge in court prior to being selected for the jury, I was asked whether I was related to any of the persons who were going to be called as witnesses in the case. One of the witnesses the judge mentioned was Deputy Sheriff Claude Meinhard. I did not respond to the judge's question because I did not consider myself "related" to Claude Meinhard in 1994, just as I don't consider myself "related" to him now. The only time I have been related to Claude, as far as I'm concerned, was during the years we were married. Once our marriage ended in 1979, I was no longer related to him.

4. I have *never* spoken to Claude Meinhard about the Michael Wayne Williams case. The fact that he was a witness in the case made no difference to me one way or the other, and certainly didn't cause me to favor the Commonwealth or the defendant.

5. I also was asked by the judge whether I or any member of my immediate family had ever been represented by any of the attorneys in the case. I did not respond to this question for several reasons. First, I do not think of myself as ever having been "represented" by an attorney for any reason. When Claude and I divorced in 1979, the divorce was uncontested and Mr. Woodson drew up the papers so that the divorce could be completed. Since neither Claude nor I was contesting anything, I didn't think Mr. Woodson "represented" either one of us. Second, even if someone had told me at the time of trial that Mr. Woodson had represented Claude, I still do not think that I would have responded to the judge's question because after being divorced for almost 15 years at the time I certainly did not consider Claude to be a member of my immediate family.

6. I tried my best to answer all of the judge's questions accurately. I also tried my best to be a good juror and to give the defendant a fair trial.

/s/ Bonnie Stinnett
Bonnie Stinnett

Subscribed and sworn to before me by Bonnie Stinnett this 27th day of April, 1998

/s/ Jennifer S. Turner
Notary Public

My commission expires: March 31, 2000
[I was commissioned as Jennifer Anne Sam.]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

[Caption Omitted In Printing]

AFFIDAVIT

1. My name is Robert G. Woodson, Jr. I was the Commonwealth's Attorney in Cumberland County from 1989 to 1995. I prosecuted both Michael Williams and Jeffrey Cruse for capital murder in 1994. I presently am a General District Court judge in the 10th Judicial District.

2. At the time of the jury selection process in the Michael Williams case, I was aware that Juror Bonnie Stinnett was the ex-wife of then Deputy Sheriff Claude Meinhard and I was aware that they had been divorced for some time. I have no specific recollection of Juror Stinnett being asked whether she was "related" to any of the witnesses in the case, but I have been informed that the transcript shows that she was asked the question and that she did not respond even though "Deputy Sheriff Claude Meinhard" was recited as one of the expected witnesses. If I had heard such a question, however, I would not have expected her to state that she was "related" to her ex-husband. To my mind, people who are related only by marriage are no longer "related" once the marriage ends in divorce. Thus, I do not consider Juror Stinnett's failure to respond to the question to have been irregular in any way.

3. Until I was asked about the matter in April of 1998 by the Attorney General's Office, I had no recollection of having been involved as a private attorney in the

divorce proceedings between Claude Meinhard and Bonnie Stinnett. Even after having been shown the divorce decree with my name on it, I still have no independent recollection of the divorce case. In all likelihood, one or both of them came to me and simply asked me to draw up the papers for an uncontested divorce decree. Whatever my involvement was in the 1979 divorce, by the time of trial in 1994 I had completely forgotten about it.

/s/ Robert G. Woodson, Jr.
Robert G. Woodson, Jr.

Subscribed and sworn to before me by Robert G. Woodson, Jr. this 27th day of April, 1998.

/s/ Illegible
Notary Public

My commission expires: 10-31-2001.

CHRISTIAN & BARTON
L.L.P.

ATTORNEYS AT LAW

[Addresses Omitted in Printing]

May 5, 1998

BY HAND

Donald R. Curry
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Re: Michael W. Williams v. J.D. Netherland
Civil Action No. 3:96-CV-529

Dear Don:

This will confirm that you will contact Judge Woodson today and advise him that Barbara Hartung and I would like to meet with him regarding this case, as Judge Merhige suggested. Judge Merhige asked that we report back to him regarding this matter. We would like to advise him of Judge Woodson's position as soon as possible.

Yours very truly,

/s/ James E. Moore
James E. Moore

JEM/jct

cc: Barbara L. Hartung

431745.2

[SEAL]

COMMONWEALTH OF VIRGINIA

Office of the Attorney General

Richmond 23219

[Address Omitted In Printing]

May 5, 1998

James E. Moore, Esquire
Christian and Barton, L.L.P.
909 East Main Street
Richmond, Virginia 23219-3095

Re: *Williams v. Netherland*
Civil Action No. 3:96CV529

Dear Jim:

Today, I spoke to Judge Robert G. Woodson, Jr., and advised him that Michael Williams' counsel wished to speak with him about Williams' case. I also told Judge Woodson that I had informed Judge Merhige this morning that I had no objection to such an informal interview. Judge Woodson has informed me, however, that he already has given two affidavits concerning Williams' claims and that he declines the invitation to discuss the matter with Williams' counsel. By a copy of this letter, I am informing Judge Merhige of Judge Woodson's wishes.

Sincerely,

/s/ Don
Donald R. Curry
Senior Assistant Attorney General
Criminal Litigation Section

cc: Honorable Robert R. Merhige, Jr., Judge
Barbara Hartung, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,	)	
Petitioner,	)	Civil Action
	)	No. 3:96CV529
v.	)	
J.D. NETHERLAND, WARDEN,	)	
Respondent.	)	

ORDER

(Filed May 15, 1998)

Upon due consideration, and deeming it proper so to do, it is hereby ADJUDGED and ORDERED that:

(1) Having failed to demonstrate "good cause" for the discovery request, Petitioner's Motion For Leave To Invoke Discovery (Docket No. 103) is DENIED;

(2) Respondent's Motion For Summary Judgment (Docket No. 100) is CONTINUED UNDER ADVISEMENT;

(3) The evidentiary hearing currently scheduled for May 18, 1998, is continued until **9:30 a.m., Friday, May 29, 1998.** Counsel for each of the parties herein shall, by **1:00 p.m., May 26, 1998,** file Proposed Findings of Fact and Conclusions of Law with the Clerk of this Court; and

(4) Having reconsidered its rulings, the Court reaffirms its dismissal of Claims III(A)(1), III(A)(8), IV(A)(2), V(A)(1), and VII(G). Accordingly, Petitioner's Motion To Alter Or Amend (Docket No. 103) is DENIED.

Let the Clerk send a copy of this Order to all counsel of record.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

DATE: **May 15, 1998**

FILED: May 27, 1998

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-17
(CA-96-529-3)

In Re: FRED W. GREENE, Warden,
Mecklenburg Correctional Center,

Petitioner,

ORDER

On November 20, 1996, Michael Wayne Williams filed a petition for a writ of habeas corpus in federal court in the Eastern District of Virginia. On April 13, 1998, the district court dismissed most of Williams' claims but granted him an evidentiary hearing on three claims. That evidentiary hearing is scheduled to occur on June 2, 1998. The Commonwealth now seeks to prevent the district court from holding the evidentiary hearing by filing an application for an emergency stay and a petition for a writ of mandamus and prohibition with this court.

Both parties agree that Chapter 153 of the Antiterrorism and Effective Death Penalty Act (AEDPA) governs Williams' petition. AEDPA establishes certain limits on a court's ability to conduct an evidentiary hearing where an applicant has failed to develop the factual basis of a

claim in state court. In such cases, the court may hold an evidentiary hearing only if the claim satisfies two requirements. First, the claim must rely on either certain retroactive new rules of constitutional law or "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A). Second, the underlying facts must "be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id.* § 2254(e)(2)(B).

In granting the evidentiary hearing, the district court did not apply these requirements. Instead, it simply cited several pre-AEDPA cases to support its conclusion that defendant has demonstrated cause and prejudice. This, we believe, was error.

Accordingly, the warden's application for an emergency stay is granted and the matter is remanded for further proceedings. On remand, the district court must determine whether, under AEDPA, Williams is entitled to an evidentiary hearing on these claims. Until the district court has evaluated Williams' entitlement to an evidentiary hearing under the strict requirements of AEDPA, we believe it would be premature to act on any petition for a writ of mandamus and prohibition.

The warden's application for an emergency stay is granted and the matter remanded for further proceedings as set forth herein.

Entered at the direction of Chief Judge Wilkinson, with the concurrence of Judge Williams. Judge Hamilton voted to deny the application and petition.

For the Court

/s/ Patricia S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS, Petitioner,	)	
v.	)	Civil Action
J.D. NETHERLAND, WARDEN,	)	No. 3:96CV529
Respondent.	)	

ORDER

(Filed Jun. 3, 1998)

Upon due consideration, for the reasons stated in the Memorandum this day filed, and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED that:

(1) The Court's Order, dated April 13, 1998, granting an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5) is VACATED;

(2) Petitioner's federal habeas petition is DISMISSED in its entirety;

(3) Respondent's Motion For Summary Judgment is DENIED AS MOOT;

(4) At the expiration of thirty (30) days, unless an appeal has been filed, let the Clerk return to the appropriate repository such records as the Court has received in reference to this cause;

(5) This action is dismissed with prejudice; and

(6) All remaining motions not previously ruled on by the Court are DENIED AS MOOT.

Let the Clerk send a copy of this Order and the accompanying Memorandum to all counsel of record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

DATE: June 3, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Caption Omitted In Printing]

MEMORANDUM

This matter is before the Court on remand from the United States Court of Appeals for the Fourth Circuit. For the reasons which follow, the Court concludes that Petitioner Michael Wayne Williams ("Williams") is not entitled to an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5). Accordingly, the Court will VACATE its Order granting Williams an evidentiary hearing on these claims, and DISMISS Williams' federal habeas petition in its entirety.

I.

On April 13, 1998, this Court dismissed the majority of Williams' federal habeas claims, but granted an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5). Respondent J.D. Netherland, Warden of Mecklenberg [sic] Prison ("Respondent"), subsequently moved for summary judgment, arguing that this Court misapplied applicable federal law. The Court heard argument on the motion and took the matter under advisement. Respondent then moved the Court for a stay of its order requiring the evidentiary hearing, pending resolution by the Fourth Circuit of an Application For Emergency Stay and a Petition For A Writ Of Mandamus And Prohibition which Respondent filed the next day. On May 27, 1998, the Fourth Circuit granted Respondent's Application For An Emergency Stay and remanded the matter for further proceedings.[1]

II.

A. Applicability of 42 U.S.C. § 2254(e)(2)

In remanding the matter, the Fourth Circuit directed this Court to apply the requirements of 28 U.S.C. § 2254(e)(2) in evaluating whether Williams is entitled to an evidentiary hearing on his claims. *See* CA4 Stay Order (May 27, 1998) at 2. A section 2254 petition is ordinarily

---

[1] The Fourth Circuit withheld ruling on Respondent's Petition For A Writ Of Mandamus And Prohibition until this Court reevaluated Williams' entitlement to an evidentiary hearing under the Antiterrorism and Effective Death Penalty Act ("AEDPA").

limited to the factual record developed in state court proceedings, as the amended section 2254(e)(2) limits a petitioner's ability to present evidence in a federal habeas proceeding that was not considered by the state court.

Specifically, section 2254(e)(2), as amended, provides that a petitioner may not present evidence in a federal habeas proceeding that was not considered by the state court if the petitioner "failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). In addition, a petitioner is only entitled to an evidentiary hearing if:

> (A) the claim relies on –
>
> > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

While the Fourth Circuit has not yet addressed the applicability or meaning of section 2254(e)(2), Judge Ellis has carefully considered the proper interpretation of this section and concluded the following:

> [A]n applicant "fails" when he does not take or seek the opportunity to develop evidence in a state court proceeding. This is where (e)(2) applies. And this is where (e)(2)(A) may forgive the failure if new facts or a retroactive change in constitutional law form the basis of a claim. In contrast, an applicant does not "fail" where he seeks, but is denied, the opportunity to develop facts in state court. In this event, the rigorous standard of § 2254(e)(2) will not apply.

Cardwell v. Netherland, 971 F. Supp. 997, 1011 (E.D. Va. 1997). Thus, a petitioner's "failure" to develop the factual basis of a claim in state court proceedings must be attributable to some sort of fault on the part of the petitioner – i.e. something the petitioner did or omitted to do.

Other district and circuit courts have reached similar conclusions. *See, e.g., Jones v. Woods*, 114 F. 3d 1002, 1013 (9th Cir. 1997) ("Where, as here, the state courts simply fail to conduct an evidentiary hearing, the AEDPA does not preclude a federal evidentiary hearing on otherwise exhausted habeas claims."); *Burris v. Parke*, 116 F.3d 256, 258-59 (7th Cir. 1997) ("To be attributable to a 'failure' under federal law the deficiency in the record must reflect something the petitioner did or omitted."); *Hunter v. Vasquez*, 1996 WL 612484, *6 (N.D. Cal. 1996) (holding that where the state court denies petitioner's requests for discovery, investigatory funds, and a hearing, "the Court cannot find that Petitioner failed adequately to develop the facts of his claims in state court.").

Moreover, the United States Supreme Court's recent decision in *Breard v. Greene*, 118 S. Ct. ___, 1998 U.S. LEXIS

2465 (April 14, 1988), does not compel a different conclusion. In *Breard*, the Supreme Court simply reiterated what the plain language of section 2254(e)(2) and the previously cited cases reveal – that the limitation on evidentiary hearings in federal habeas proceedings applies only when the *petitioner* fails to develop the factual basis of a claim in state court proceedings. *See id.* at *3. Contrary to Respondent's tortured interpretation of the relevant language, the Supreme Court did not hold that the word "fail" in section 2254(e)(2) be given a strict liability reading. As the Seventh Circuit has noted, if such was the case, "then a state could insulate its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts. Nothing in sec. 2254(e) or the rest of the AEDPA implies that states may manipulate things in this manner." *Burris v. Parke*, 116 F.3d 256, 258-59 (7th Cir. 1997).

Thus, the plain meaning of section 2254(e)(2) prohibits a federal evidentiary hearing only in those cases where a petitioner has been afforded an opportunity to develop evidence in state habeas court, but has failed to do so. *See* 28 U.S.C. § 2254(e)(2); *Cardwell v. Netherland*, 971 F. Supp. 997, 1011 (E.D. Va. 1997). Only under such circumstances is this Court precluded from considering new facts presented for the first time in federal habeas proceedings or granting an evidentiary hearing for the consideration of same.

In Petitioner's case, it is clear that he did not "fail[ ] to develop" the factual basis of his claims. The record is replete with examples of state habeas counsel's numerous attempts to obtain the evidence required to discover, present, and prove Williams' claims – including informal

attempts to resolve discovery matters between counsel which were repeatedly rebuffed. The state courts further denied Williams the opportunity to develop the necessary facts by denying all of Williams' requests for discovery, expert assistance, and investigative funds, and by refusing to hold any hearing to take evidence outside of the trial record. Under such circumstances, the Court is hard-pressed to find that Williams "failed to develop the factual basis of a claim in State Court proceedings," thereby triggering application of section 2254(e)(2).

Despite its concerns over the applicability of section 2254(e)(2) to cases such as the present one, however, this Court has been directed by its Court of Appeals to apply section 2254(e)(2) to Williams' case. Under that stringent standard, which is now the law of this case, the Court concludes that Williams is not entitled to an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5).

B. Analysis

As discussed above, unless Williams can satisfy both subsection (A) and subsection (B) of 28 U.S.C. § 2254(e)(2), this Court must deny him an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5). Based on the present record, the Court agrees with Respondent's argument that "regardless of whether petitioner can satisfy § 2254(e)(2)(A), he cannot possibly satisfy the stringent requirements of § 2254(e)(2)(B)." Resp't Resp. to CA4 Stay Order at 4.

Subsection (B) of 28 U.S.C. § 2254(e)(2) requires a showing by "clear and convincing evidence that but for [the alleged] constitutional error, no reasonable factfinder

would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). In the instant case, Williams was convicted of capital murder on evidence, including his own testimony, which demonstrated that he was a participant in the armed robbery of Mr. and Mrs. Keller, that he was at minimum an accomplice in the rape of Mrs. Keller, and that he fired the first shot into Mr. Keller's head. According to the medical evidence presented at trial, any of the three gunshot wounds to Mr. Keller's head could have been potentially lethal and all three definitely contributed to his death. *See* Tr. 1-4-94 at 252-56, 262-64. Based on this evidence alone, Williams cannot demonstrate by "clear and convincing evidence" that no reasonable juror would have found him guilty of the capital murder of Mr. Keller.

Moreover, there is no "but for" nexus between Claims I(A), IV(A)(1), or IV(A)(5) and the "innocence" requirement of subsection (B). As noted by Respondent, Claims I(A) and IV(A)(5) which involve a juror's allegedly untruthful answers during voir dire do not have any bearing on the evidence presented at trial of Williams' guilt in the shooting death of Mr. Keller. Furthermore, even assuming *arguendo* that some sort of informal understanding did exist between Williams' co-defendant, Cruse, and the Commonwealth prior to Cruse's testimony at Williams' trial [Claim IV(A)(1)], Williams' own testimony established that he shot Mr. Keller during the commission of a robbery and subsequent to the rape of Mrs. Keller and that therefore, he is guilty of capital murder. Thus, even if the jury chose to believe Williams' version of the shootings over Cruse's testimony, Williams himself admitted under oath to firing the

first shot into Mr. Keller's head – a shot which the medical examiner testified as being potentially lethal.

In light of the foregoing, the Court finds that Williams cannot make the requisite showing of "innocence" under 28 U.S.C. § 2254(e)(2) and thus, he is not entitled to an evidentiary hearing on his remaining claims. Accordingly, the Court will VACATE its Order granting an evidentiary hearing on Claims I(A), IV(A)(1), and IV(A)(5), and DISMISS Williams' federal habeas petition in its entirety.

An appropriate Order shall issue.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

DATE: June 3, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS Plaintiff. v. J.D. NETHERLAND, WARDEN Defendant.	Civil Action Number 3:96CV529

ORDER

(Filed Nov. 12, 1998)

THIS MATTER comes before the Court on Petitioner Michael Wayne Williams' Motion to Alter or Amend this Court's June 3, 1998 Order, which dismissed his petition for federal habeas corpus relief under 28 U.S.C. § 2254, pursuant to Fed. R. Civ. P. 59(e).

This Court has made it clear previously that Rule 59(e) may not be used as a vehicle for revisiting issues that have already been argued and decided. *Delong v. Thompson*, 790 F. Supp. 594, 618 (E.D. Va. 1991). In this case, the issue at the heart of Petitioner's Motion – i.e., the precise import of the Fourth Circuit's May 28, 1998 Stay Order – was thoroughly argued by both sides. If the petitioner wishes to challenge this Court's resolution of that issue, the appropriate course of action is to appeal,

not to seek reconsideration under Rule 59(e). Accordingly, the instant Motion is DENIED.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

NOV 12 1998
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS Plaintiff. v. J.D. NETHERLAND, WARDEN Respondent.	Civil Action Number 3:96CV529

ORDER

(Filed Dec. 15, 1998)

THIS MATTER comes before the Court on Petitioner Michael Wayne Williams' second Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e). This Court denied Williams' first Rule 59(e) motion on November 12, 1998. In doing so, the Court made clear that 59(e) is not the appropriate vehicle for challenging the dismissal of his habeas petition. The proper course is to appeal the dismissal to the United States Court of Appeals for the Fourth Circuit. Notwithstanding the Court's explicit direction, Williams has filed the instant motion. For the same reasons expressed in the Court's November 12, 1998 Order, the motion is hereby DENIED.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

December 15, 1998
DATE

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL WAYNE WILLIAMS, *Petitioner-Appellant,* v. JOHN B. TAYLOR, Warden, Sussex I State Prison, *Respondent-Appellee.*	)	No. 99-1

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge;
Robert R. Merhige, Jr., Senior District Judge.
(CA-96-529-3)

Argued: June 7, 1999

Decided: August 2, 1999

Before WILKINSON, Chief Judge, and
HAMILTON and WILLIAMS, Circuit Judges.

Affirmed by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Hamiton and Judge Williams joined.

COUNSEL

ARGUED: Barbara Lynn Hartung, Richmond, Virginia, for Appellant. Donald Richard Curry, Senior Assistant

Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee. **ON BRIEF:** James E. Moore, CHRISTIAN & BARTON, L.L.P., Richmond, Virginia, for Appellant. Mark L. Earley, Attorney General of Virginia, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee.

OPINION

WILKINSON, Chief Judge:

Michael Wayne Williams was sentenced to death for the murders of Morris Keller, Jr., and his wife, Mary Keller. At trial, Williams admitted to robbing the Kellers, being an accomplice to the rape of Mrs. Keller, and shooting Mr. Keller. He now appeals the district court's denial of his petition for a writ of habeas corpus. We affirm the judgment of the district court.

I.

Between 9:30 and 10:30 on the night of Saturday, February 27, 1993, Williams and Jeffrey Alan Cruse caught a ride with Verena Lozano James to a rural area in Cumberland County. Williams and Cruse intended to rob the nearby Bear Creek Market with a .357 caliber Ruger Black Hawk revolver that Williams had given to Cruse.

After finding the market closed, Williams informed Cruse that "he knew a house where we can go; they'd have a couple thousand dollars." The two men then proceeded to the home of Mr. and Mrs. Keller. Mr. Keller opened the door, Williams pointed the .357 at him, and both Williams and Cruse walked inside the house.

Williams and Cruse then escorted Mr. Keller to the Kellers' kitchen, where the three men encountered Mrs. Keller. Williams demanded that the Kellers remove their clothing. Cruse then began to search the house for money and other valuables while Williams remained with the Kellers. Cruse located a fully-loaded .38 caliber handgun during his search. When Cruse returned to the kitchen, Williams suggested they tie the Kellers up, and Cruse did so with some phone cord. Williams and Cruse then placed the Kellers in a living room closet and continued their search of the house.

Some time later Cruse moved Mrs. Keller, still naked, to another closet – this one in a back bedroom of the house. Both Williams and Cruse then raped Mrs. Keller. During the rape Mrs. Keller pleaded, "Just don't hurt us." After they had finished, Williams and Cruse retrieved Mr. Keller, and Williams instructed both Kellers to take showers and put on clean clothing. Williams then told the Kellers they were going to "take a walk." On the way out of the house Williams informed Mrs. Keller that he planned to burn the house. Upon Mrs. Keller's request, Williams accompanied her back inside to get the Kellers' marriage license.

With Williams carrying the .38 and Cruse the .357, the two men walked the Kellers down a dirt road and into a thicket. Williams then took up a position directly behind Mr. Keller and Cruse stood behind Mrs. Keller. Williams said, "We'll shoot at the count of three." At the count of three, Williams shot Mr. Keller, who fell to the ground. Cruse did not fire. Williams turned to Cruse and told him to shoot. After Cruse shot and Mrs. Keller fell, Mr. Keller stood up again. Williams then shot him a

second time. As Cruse began to walk away, Williams said, "Wait. . . . What if they ain't dead?" Williams then approached the Kellers and shot each a few more times.

Williams and Cruse next returned to the house, where they loaded the Kellers' Jeep Cherokee with their television set, microwave oven, stereo and speakers, and shotgun. After loading the Cherokee, the two men set fire to the house.

The next day Williams and Cruse sold some of the property they had taken from the Kellers. They then threw the remaining property and the .357 into the Rappahannock River and set fire to the Cherokee.

When James heard about the fire at the Kellers' house, she contacted the police and informed them that she had deposited Williams and Cruse near the house on the night of the fire. The police interviewed Cruse, who was unresponsive until the police located the bodies of Mr. and Mrs. Keller.

After consulting counsel, Cruse agreed to a plea bargain pursuant to which he would disclose his knowledge of the crimes in exchange for a promise from the Commonwealth not to seek the death penalty. Cruse then gave a statement in which he explained the events of the fateful night in detail, with the exception of Cruse's own participation in the rape of Mrs. Keller. Upon learning of Cruse's falsehood, the Commonwealth revoked its plea agreement with Cruse and later indicted him for capital murder.

Williams was indicted for the capital murder, robbery, rape, and abduction of Mrs. Keller; for the capital

murder, robbery, and abduction of Mr. Keller; for capital murder based on two related homicides; statutory burglary; and arson. At trial in January 1994, Williams took the stand in his own defense. He confirmed significant parts of the Commonwealth's case. In particular, he indicated that he was the one who suggested robbing the Bear Creek Market, that it was his suggestion to set fire to the Kellers' house, and that he shot Mr. Keller in the head. He contradicted portions of the evidence presented against him, most of which was in the form of testimony by Cruse. Specifically, he denied that he also raped Mrs. Keller, that he fired any shots other than the first one, and that he was the instigator at various other points during the commission of the crimes.

The jury convicted Williams of capital murder. It then recommended the death sentence on the basis of Williams' future dangerousness and the vileness of his crimes. The trial court agreed with the jury's recommendation and sentenced Williams to death. The Supreme Court of Virginia affirmed the conviction and sentence, *Williams v. Commonwealth*, 450 S.E.2d 365 (Va. 1994), and the United States Supreme Court denied certiorari, *Williams v. Virginia*, 515 U.S. 1161 (1995).

Williams then filed a petition for state habeas and moved for discovery, an evidentiary hearing, and expert assistance. The Supreme Court of Virginia denied these motions and the petition, stating without explanation that Williams' claims were meritless. The United States Supreme Court again denied certiorari. *Williams v. Netherland*, 519 U.S. 877 (1996).

Next, Williams filed a petition for habeas corpus in the United States District Court for the Eastern District of Virginia. The district court granted Williams an evidentiary hearing on three of his claims and dismissed the rest. Because Williams filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, this court entered a stay and instructed the district court to reconsider its grant of an evidentiary hearing in light of 28 U.S.C. § 2254(e) as amended by that Act. After applying the AEDPA, the district court denied Williams' request for an evidentiary hearing and dismissed his petition in its entirety. Williams now appeals.

II.

Williams maintains he was entitled to an evidentiary hearing in the district court to establish several claims. Two of those claims arise under the Sixth Amendment. First, Williams claims that one of the jurors failed to answer honestly questions put to her on voir dire. *See United States v. Bynum*, 634 F.2d 768 (4th Cir. 1980). Specifically, Williams contends that juror Bonnie Stinnett failed to disclose that she had once been married to Deputy Sheriff Claude Meinhard – who would testify for the Commonwealth – when Stinnett was asked whether she was related to any witness in the case. Williams also maintains that Stinnett withheld the fact that prosecutor Robert Woodson had represented her in her divorce proceedings. Second, Williams claims that the prosecutor improperly failed to correct the dishonest juror. Williams argues that Woodson failed to disclose both of these pieces of information and thereby violated his right to a

fair trial. *See United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993).

With respect to his other claim, Williams maintains that the Commonwealth failed to provide him with exculpatory evidence as required under *Brady v. Maryland*, 373 U.S. 83 (1963). In particular, Williams claims that the Commonwealth failed to disclose a psychiatric evaluation that indicated Cruse had little specific recollection of the events surrounding the Keller murders.

A.

The district court denied Williams an evidentiary hearing on these claims. Section 2254(e)(2) provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). The district court held that whatever else Williams could show, he could not demonstrate actual innocence as required by section 2254(e)(2)(B).

Williams argues that the district court erred in applying section 2254(e)(2) to his request at all. He maintains that section 2254(e)(2) applies only when the petitioner "has *failed* to develop the factual basis of a claim in State court." *Id.* (emphasis added); *see also Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir.), *cert. denied*, 119 S.Ct. 587 (1998). According to Williams, he did not "fail" to develop the factual foundation for any of these claims in state court. Williams argues that he had no way of knowing the specific facts underlying his claims. This is especially true, Williams maintains, because the Supreme Court of Virginia denied his requests for discovery, a hearing, and expert and investigative assistance. Williams contends, therefore, that section 2254(e)(2) should not apply to his request for a hearing in district court.

We disagree. To escape the requirements of section 2254(e)(2), a petitioner must "diligently . . . develop the factual basis of" his claim in state court. *Cardwell*, 152 F.3d at 337; *see also Wright v. Angelone*, 151 F.3d 151, 164 (4th Cir. 1998) (in order to obtain evidentiary hearing petitioner must show "why the factual predicate for this claim could not have been discovered earlier"). Ignorance in and of itself is not sufficient to show diligence; that ignorance must be reasonable. *See Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (to be excused, legal basis of a

claim must not be reasonably available). Nor may a petitioner's requests for investigative assistance, hearings, and discovery on state habeas be vague and conclusory. Rather, a petitioner must tie his requests to his specific claims and state with some particularity the need for assistance. To hold otherwise would permit criminal defendants to avoid the strictures of section 2254(e)(2) simply by churning out unsupported, boiler plate requests for state court discovery, hearings, and investigative and expert assistance.

Williams clearly has not "diligently sought to develop the factual basis of" his claims for federal habeas relief. *Cardwell*, 152 F.3d at 337. The documents supporting Williams' Sixth Amendment claims have been a matter of public record since Stinnett's divorce became final in 1979. Indeed, because Williams' federal habeas counsel located those documents, there is little reason to think that his state habeas counsel could not have done so as well. Williams' request for investigative assistance was also deficient. He alluded vaguely to "irregularities, improprieties and omissions" with regard to jury selection and asked for an investigator to examine "all circumstances relating to the empanelment of the jury and the jury's consideration of the case." This request in no way alerted the state habeas court to any specific claim. *See Picard v. Connor*, 404 U.S. 270, 275 (1971) ("[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." (internal quotation marks omitted)). The failure to develop the Sixth Amendment claims was thus

attributable to petitioner, not to the Supreme Court of Virginia's rejection of a fishing expedition request.

The same is true of Cruse's psychiatric evaluation. In support of his claim that the Commonwealth suppressed the evaluation, Williams provides nothing more than an affidavit from his state habeas counsel attesting to "no recollection of seeing this report in Mr. Cruse's court file." In light of the fact that Williams' federal habeas counsel located the evaluation in this very file, state habeas counsel's failure to see the report is insufficient to demonstrate diligence. Indeed, that failure tends to show that counsel did *not* act diligently.

Thus, it is clear that section 2254(e)(2) applies to Williams' request for a hearing. It is equally clear that Williams is ineligible for a hearing in federal court under this section. To be eligible, Williams must be able to demonstrate both due diligence and that "but for [the alleged] constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(A)(ii)-(B).

The discussion above makes plain that Williams was not duly diligent. Nor can Williams show that no reasonable factfinder would have found him guilty of capital murder. At trial Williams himself testified that he robbed the Kellers at gunpoint, was at least an accomplice to the rape of Mrs. Keller, and was the first person to shoot Mr. Keller in the head. The Commonwealth's Assistant Chief Medical Examiner, who performed the autopsy on Mr. Keller, testified that each gunshot wound suffered by Mr. Keller contributed to his death. Moreover, although Williams denied that he raped Mrs. Keller, tests on seminal

fluid retrieved from her body revealed that some of the fluid could be attributed only to Williams.

Under Virginia law, this evidence was more than sufficient to convict him of capital murder. *See Strickler v. Commonwealth*, 404 S.E.2d 227, 235 (Va. 1991) ("We adhere to the view that where two or more persons take a direct part in inflicting fatal injuries, each joint participant is an 'immediate perpetrator' for the purposes of the capital murder statutes."); *Briley v. Commonwealth*, 273 S.E.2d 57, 63 (Va. 1980) (holding that it is only necessary to prove that defendant was immediate perpetrator in the murder and accomplice in the rape to convict of capital murder). In sum, it is not surprising that the district court found that based "on this evidence alone, Williams cannot demonstrate by 'clear and convincing evidence' that no reasonable juror would have found him guilty of the capital murder of Mr. Keller," that "Williams cannot make the requisite showing of 'innocence' under 28 U.S.C. § 2254(e)(2)," and that "he is not entitled to an evidentiary hearing on his remaining claims."

B.

Even were section 2254 not to apply, Williams would be unable to show his eligibility for a hearing under pre-AEDPA law. *See Cardwell*, 152 F.3d at 337 ("If, on the other hand, the applicant has not 'failed to develop' the facts in state court, the district court may proceed to consider whether a hearing is appropriate, or required under [pre-AEDPA law]."). Williams can show neither cause for nor prejudice from his failure to raise the aforementioned

Sixth Amendment and *Brady* claims in state court. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

To demonstrate cause, Williams must establish that " 'some objective factor external to the defense impeded counsel's efforts.' " *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). As noted, Williams' failure to develop the facts in state court was due to his own lack of diligence. Williams neither brought forth reasonably available facts, nor made reasonable efforts to convince the Supreme Court of Virginia that additional discovery was warranted.

Williams is also unable to demonstrate prejudice. In order to do so, he must show that, absent the alleged constitutional violation, the outcome of the case likely would have been different. *See Carrier*, 477 U.S. at 494. As we have indicated, Williams' trial testimony alone was enough to convict him. *See Fitzgerald v. Greene*, 150 F.3d 357, 366 (4th Cir.) (finding no actual prejudice based on overwhelming evidence of guilt, future dangerousness, and vileness of crime), *cert. denied*, 119 S.Ct. 389 (1998). Moreover, Williams' claims with respect to juror Stinnett were marginal. It is hardly clear that Stinnett was related to Deputy Sheriff Meinhard given that the two divorced some fifteen years before Williams' trial. Furthermore, Meinhard's testimony was brief and did not speak to the critical facts of the trial. In fact, Williams' trial attorneys saw no need to cross-examine him. And the prosecutor explained his failure to notify the court of the relationship in an affidavit in which he stated that he simply did not remember being involved in Stinnett's divorce – a plausible claim given that the divorce occurred fifteen years prior to Williams' trial and was uncontested.

Finally, it is anything but clear that a divorce from one of the Commonwealth's witnesses would predispose a juror toward the Commonwealth's case.

For all of these reasons, the district court properly denied Williams' request for an evidentiary hearing.

III.

Williams next challenges the district court's dismissal of two claims on which the Supreme Court of Virginia found against Williams on the merits. We review decisions by state courts on the merits of a claim under section 2254(d). Section 2254(d) provides that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Under normal circumstances, section 2254(d)(1) prohibits the issuance of the writ unless the state court decision conflicts squarely with Supreme Court precedent which is controlling as to law and fact,

or if no such precedent exists, if "the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant supreme court precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts." *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 844 (1999). Where, as here, "the state court decision fails to articulate any rationale for its adverse determination . . . [we] must independently ascertain whether the record reveals a violation of [petitioner's constitutional rights.]" *Cardwell*, 152 F.3d at 339. Nonetheless an overall obligation of deference to the state court system still obtains, and a state court's perfunctory decision both constitutes an adjudication on the merits, *see Wright v. Angelone*, 151 F.3d 151, 156-57 (4th Cir. 1998), and must be upheld if it "is at least minimally consistent with the facts and circumstances of the case." *Weeks v. Angelone*, 176 F.3d 249, 259 (4th Cir. 1999) (internal quotation marks omitted). Here that standard of minimal consistency was more than met.

A.

Williams first claims that the prosecution suppressed an alleged informal plea agreement that the Commonwealth had with Cruse in violation of *Brady*. The Supreme Court of Virginia was correct, however, to reject Williams' claim. In state court the Commonwealth supplied two affidavits – one from Woodson and one from Cruse's trial counsel, Donald Blessing – stating unequivocally that Cruse had no agreement. Specifically, Woodson swore, "At the time Cruse testified against Williams in January

of 1994, he had no plea agreement. Cruse testified truthfully that there was no plea agreement and that he remained charged with capital murder and subject to the death penalty." Similarly, Blessing stated, "Cruse testified truthfully at . . . trial that he had no plea agreement, that he remained charged with capital murder for the Cumberland offenses, and that he was subject to a possible death sentence."

Moreover, before the district court, the Commonwealth introduced another affidavit from Blessing, in which he swore, "At the time Cruse testified against Williams in Cumberland County, he had no agreement or understanding, formal or informal, with the Commonwealth." The district court thus properly credited the state court's judgment, and there is no reason for federal courts to revisit the state court's determination in a federal hearing in view of the unrefuted evidence. *See Eaton v. Angelone*, 139 F.3d 990, 995 (4th Cir.) (refusing to transform "a federal habeas proceeding into a second trial."), *cert. denied*, 118 S.Ct. 2338 (1998); *Spencer v. Murray*, 18 F.3d 229 (4th Cir. 1994) (upholding denial of habeas corpus on basis of trial counsel's affidavit); *Sawyers v. Collins*, 986 F.2d 1493, 1504 (5th Cir. 1993) (en banc) (upholding denial of habeas corpus without evidentiary hearing even when state court made factual determination solely on basis of affidavits).

Finally, even if Williams could demonstrate that Cruse had an informal plea agreement, he could not show materiality. *See Kyles v. Whitley*, 514 U.S. 419 (1995) (demonstration of a *Brady* claim requires a showing of materiality). Given Williams' own testimony that he was at least an accomplice in the rape of Mrs. Keller and that he

shot Mr. Keller in the head, we are confident there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 433-34 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)). As a result, we agree that Williams failed to demonstrate a *Brady* violation.

B.

Williams next argues that the prosecutor violated his Sixth Amendment right to be present at trial and to confront adverse witnesses. *See Illinois v. Allen*, 397 U.S. 337 (1970) (Sixth Amendment right to be present at trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment right to confront prosecution's witnesses). Specifically, Williams charges that prosecutor Woodson impermissibly burdened those rights when, on cross-examination, he asked Williams, "You're the only witness who has sat in here through this trial and heard the testimony of every witness before you got to testify; isn't that correct?"[1]

We need not decide whether allowing the prosecutor to proceed with this line of questioning was constitutional error because even if it were, the error was harmless. *See Sherman v. Smith*, 89 F.3d 1134, 1137 (4th Cir. 1996) (en banc) (noting that harmless error analysis applies to similar trial errors such as improper comment

---

[1] Indeed, the Supreme Court has recently granted certiorari on this very question. *Portuondo v. Agard*, 119 S.Ct. 1248 (1999).

on defendant's silence at trial). Woodson's line of questioning was clearly aimed at impeaching Williams' testimony in the eyes of the jury. Such impeachment, however, would only have undermined Williams' exculpatory testimony, leaving unaffected his inculpatory testimony. And, as noted, Williams' inculpatory testimony was devastating. In such circumstances, it is clear that the error, if that it was, did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotation marks omitted).

Williams' claim is similarly unavailing under pre-AEDPA law. Whether or not we would determine independently that Woodson's question violated Williams' Sixth Amendment rights, it is clear that such a holding would create a new rule. *See Teague v. Lane*, 489 U.S. 288 (1989). Williams points to *Griffin v. California*, 380 U.S. 609 (1965), and *Brooks v. Tennessee*, 406 U.S. 605 (1972), to support his claim. In *Griffin*, the Supreme Court established that drawing a negative inference from the fact that a defendant has exercised his right to remain silent violates his Fifth Amendment rights. 380 U.S. at 613. In *Brooks*, the Court held that requiring a defendant to testify first or not to testify at all also impermissibly burdened his Fifth Amendment right to remain silent. 406 U.S. at 613. Neither decision held that it is constitutionally impermissible to impeach the defendant's testimony if he decides not to remain silent by commenting on his singular ability to hear the entirety of the preceding witnesses' testimony. Indeed, the Court in *Brooks* was careful to recognize the "risk of a defendant's coloring his testimony to conform to what has gone before" and to

stress that "our adversary system reposes judgment of the credibility of all witnesses in the jury." *Id.* at 611. In short, we cannot hold that either *Griffin* or *Brooks* "dictate[s]" a finding of constitutional error in circumstances such as these. *Stringer v. Black*, 503 U.S. 222, 228 (1992).

The district court correctly denied Williams' requests for relief on these two claims.

IV.

A.

Williams next argues that the district court misinterpreted 21 U.S.C. § 848(q)(9). Section 848(q)(9) governs the granting of expert assistance to indigent prisoners in connection with their federal habeas proceedings, providing that

> Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). *No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality.* Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

Id. (emphasis added).

Williams contends that the district court erred in interpreting this section to require Williams to show a need for confidentiality in an adversary hearing. When the district court made that determination, Williams refused to participate in an adversary hearing, and the district court denied his request for expert assistance.

We agree with the district court. In limiting *ex parte* requests for expert assistance, Congress was clearly addressing the routine approval of such requests even in those instances where expert or investigative services were unnecessary. Section 848(q)(9) explicitly provides that there shall be no "*ex parte* . . . communication . . . pursuant to this section" without a showing of a need for confidentiality. *Id.* Allowing an *ex parte* hearing to determine the need for an *ex parte* hearing not only seems convoluted, but it also runs afoul of the plain language of the statute. *See United States v. Gonzales*, 150 F.3d 1246, 1264 (10th Cir. 1998) (process is one that "is *not* to be held *ex parte unless* a proper showing is made concerning the need for confidentiality." (emphasis added) (internal quotation marks omitted)), *cert. denied sub nom. Albuquerque Journal v. Gonzales*, 119 S.Ct. 918 (1999); *Patrick v. Johnson*, 37 F.Supp.2d 815, 816 (N.D.Tex. 1999) ("Section 848(q)(9) clearly requires 'a proper showing . . . concerning the need for confidentiality' before the Court may consider *any ex parte* communication or request." (emphasis added) (quoting 21 U.S.C. § 848(q)(9))).

The district court also rightly denied Williams' request for expert assistance. When Williams refused to proceed after the district court required him to demonstrate his need for confidentiality in an adversary hearing, he necessarily failed to show that expert services were "reasonably necessary." 21 U.S.C. § 848(q)(9).[2]

B.

Finally, Williams argues that the district court erred by requiring him to file his federal habeas petition within 180 days of April 24, 1996 – the AEDPA's enactment date – pursuant to 21 U.S.C. § 2263. Williams contends that section 2263 applies only to "opt-in" states – those states that have met certain requirements pertaining to, *inter alia*, the appointment and compensation of counsel for post-conviction relief proceedings. Because this circuit has not yet recognized Virginia as an "opt-in" state, Williams contends that applying section 2263 was error. Instead, Williams maintains, the district court should have granted him one year from the effective date of the AEDPA to develop his petition further. *See Brown v.*

---

[2] We are unpersuaded by Williams' argument that our interpretation of section 848(q)(9) renders it unconstitutional. Williams' sole contention is that any reading of section 848(q)(9) that requires a petitioner to divulge confidential information impermissibly impinges on his right of access to the courts. *See Gardner v. California*, 393 U.S. 367 (1969) (requiring that hearing transcripts that are made available to all be provided to indigent habeas petitioners to guarantee access to the courts). We do no more here than uphold the district court's determination that petitioner must demonstrate his need for confidentiality at a hearing. What information is disclosed at that hearing would of course remain within the discretion of the district court.

Angelone, 150 F.3d 370, 375 (4th Cir. 1998) (granting petitioners whose convictions became final in a non-opt-in state before the effective date of the AEDPA one year from the effective date to file their petitions).

Any error here was harmless. Williams' case remained in district court for a year and a half after he filed his petition. Yet Williams made not one motion to amend on the basis of claims developed during the petition's pendency. Furthermore, although Williams requests a remand for an additional five months in which to amend his petition now, he provides no additional claims he might like to add. In all events, Williams cannot demonstrate that the district court's error prejudiced him.

V.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

(ORDER LIST: 528 U.S.)

THURSDAY, OCTOBER 28, 1999

CERTIORARI GRANTED

99-6615 WILLIAMS, MICHAEL WAYNE V. TAYLOR, (99a307) WARDEN

The application for stay of execution of sentence of death presented to the Chief Justice and by him referred to the Court is granted. The motion for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Question 2 presented by the petition.